United States Court of Appeals
for the Second Circuit

APPENDIX

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77-6113

United States Court of Appeals

For the Second Circuit.

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P/S

CAROL LAVENDER, as Administratrix of the Goods, Chattels and Credits of RONALD LAVENDER, deceased, JOHN M. LUGER, as Administrator of the Goods, Chattels and Credits of JOHN W. LUGER, deceased,
Plaintiffs-Appellants,

against

UNITED STATES OF AMERICA,
Defendant-Appellee.

SEP 29 1977

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPENDIX.

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THE REPORTER COMPANY, INC., New York, N. Y. 10007—212 732-6978—1977
(2413)

PAGINATION AS IN ORIGINAL COPY

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UNITED STATES COURT OF APPEALS

For the Second Circuit.

CAROL LAVENDER, as Administratrix of the Goods, Chattels and Credits of Ronald Lavender, deceased, JOHN M. LUGER, as Administrator of the Goods, Chattels and Credits of John W. Luger, deceased,

Plaintiff-Appellants,

-against-

UNITED STATES OF AMERICA,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

DOCKET ENTRIES.

DATE		PROCEEDINGS
7-18-75	1.	Filed complaint & issued summons
7-23-75	2.	Filed a summons with marshal return Served: U.S. ATTY. BY RALPH LEE 7-21-75.
9-24-75	3.	Filed stip & order extending time of deft to 10-20-75. Owen, J.
10-21-75	4.	Filed ANSWER of deft U.S.A. to the complaint
10-29-75	5.	Filed third party complaint by deft and third party pltff. U.S.A.
12-9-75	6.	Filed Deft. & 3rd Pty Pltff's. interrogs, Set No. 1 and request for documents.

DOCKET ENTRIES

DATE		PROCEEDINGS
12-9-75	7.	Filed Deft. & 3rd Pty Pltff's. interrogs. Set No. 2 and request for documents.
12-12-75	8.	Filed 3rd Pty summons & marshal's return. Served: Consolidated Edison Co. of New York, Inc. on 11-28-75.
1-6-76	9.	Filed 3rd Pty Deft's. ANSWER to 3rd Pty. complaint.
1-14-76	10.	Filed 3rd Pty Deft's. answer to Deft's. interrogs.
3-29-76	11.	Filed 3rd Pty Deft's. supplemental answers to Deft. & 3rd Pty Pltff's. interrogs.
4-21-76	12.	Filed Deft. & 3rd Pty Pltff's. notice to take deposition of the 3rd Pty. Deft. by Charles Bailey and Thomas Trivisane, on 5-13-76.
5-25-76	---	PRE-TRIAL CONFERENCE HELD BY Mag. Schreiber.
12-6-75	---	P & C HELD BY Owens.
1-18-77	---	Trial begun (non jury)
1-19-77	---	Trial cont.
1-20-77	---	Trial cont. Decision reserved.
1-31-77	---	Filed deft's post trial memo.
4-28-77	13.	Filed Opinion #45844..Pltff. Carol Lavender, as Administratrix of the estate of her late husband Ronald Lavender, is directed to apply to the Surrogate's Court of Queens County, State of N.Y. to obtain a proper apportionment of the

DOCKET ENTRIES

DATE		PROCEEDINGS
		award for support herein, pursuant to E.P.T.L. 5-4,4. and in accordance with this opinion. The foregoing constitute my findings of fact and conclusions of law...Submit Judgment accordingly So Ordered...OWEN J. m/n
6-14-77	14.	Filed judgment #77,779...ordered that pltff have judgment against the deft on issue of liability and pltff Luger have judgment against deft in the sum of $17,063.30 and pltff Lavender have judgment against deft in sum of $15,000 and pltff Lavender have judgment against deft in sum of $369,346.92; 30,077.00 to be placed in fund for benefit of Deborah Lavender, etc. Owen J. Judgment ent, 6-15-77 Clerk m/n
7-12-77	15.	Filed notice of appeal of pltff to the UWCA from of J. Owen dated 6-15-77.
8-12-77	16.	Filed deft notice of appeal to UWCA from order of 6-15-77.
8-17-77	17.	Filed defendant's trial memorandum.
8-17-77	18.	Filed consent pre-trial order. Owen, J.

TRANSCRIPT.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---x

LAVENDER, CAROL as Administratrix of the Goods and Chattels and Credits of LAVENDER, RONALD, deceased; LUGER, JOHN M., as Administrator of the Goods, Chattels and Credits of LUGER, JOHN M. deceased,

Plaintiffs

75 Civ. 3520 (RO)

vs.

UNITED STATES OF AMERICA,

Defendant.

---x

Before:

HON. RICHARD OWEN,
District Judge

New York, New York
January 18, 1977 - 10:20 A.M.

APPEARANCES:

FUCHSBERG & FUCHSBERG, ESQS.,
Attorneys for Plaintiffs
BY: ROBERT M. GINSBERG, ESQ.

ROBERT B. FISKE, JR., ESQ.,
United States Attorney for the Southern District of New York
BY: FREDERICK P. SCHAFFER, ESQ.,
Assistant United States Attorney

(Case called.)

MR. GINSBERG: Plaintiff is ready, your Honor.

MR. SCHAFFER: Defendant is ready, your Honor.

THE COURT: Do you want to make a very brief opening statement or not? I have read the Government's memorandum of law.

MR. GINSBERG: Then I guess I should make an opening statement.

THE COURT: Do you have a memorandum for me?

MR. GINSBERG: It's being typed, your Honor, and I hope to have it by the luncheon recess.

THE COURT: Very good.

MR. GINSBERG: Your Honor, first since your Honor has mentioned that you have the Government's memorandum with the exception, I think, of the section concerning prejudgment interest which I have not researched, I think in general the cases that are applicable are fairly well presented in the Government's memorandum.

Just very briefly, your Honor, this is an action brought following the deaths of two employees of the Consolidated Edison Company who were working at the time when they were struck by or the vehicle they were working from was struck by a postal truck. As the pretrial order indicates, the question of liability has been conceded and this is simply a question of fixing damages.

THE COURT: What happened in this accident?

MR. GINSBERG: The Con Ed crew was out doing some cable work. Some of the men were in a manhole. Other men were on top of the manhole feeding cables down and they had their truck pull out. A Post Office truck came down Ninth Avenue and crashed into the Con Ed truck. Mr. Luger, one of the decedents, was pinned between the two trucks and the other decedent was knocked down and ended down on the roadway. The foreman of the crew, Mr. Sperra, who testified, was also injured but only in a minor way at the time of the accident.

We will be calling as witnesses Mr. Sperra and the gentleman who was in the pit, Mr. Church, basically to describe the condition of the two decedents at the time immediately following the accident. Both decedents were removed to the St. Claire's Hospital where the decedent Luger apparently was pronounced dead on arrival.

We have subpoenaed the record and nothing has been forthcoming.

THE COURT: I have one but I don't have the other.

MR. GINSBERG: That's correct, your Honor. Mr. Lavender lived for about twelve hours. We will produce testimony concerning pain and suffering on both of the decedents.

Mr. Luger was single and lived with his parents. They will testify, and I won't go into detail, about the family life and contributions that he was making to their household.

Mr. Lavender was married and had a two-year-old daughter and his wife will testify as to their family life and the daughter.

We have also, your Honor, subpoenaed, and they will be here, representatives from the Consolidated Edison Company and the Utility Workers Union which is the union both of these gentlemen were members of, who will indicate the salary, the fringe benefits, the overtime and also the collective bargaining agreements that are in effect.

And then, tomorrow morning, your Honor, I will present evidence from an economist who will project the economic loss to each of the families into the future. I think that's a simple quick synopsis of what our case will be about.

Thank you, your Honor.

THE COURT: Mr. Schaffer, do you want to add anything to the memo?

MR. SCHAFFER: No, your Honor.

I just wish to inform the Court that defendant's case will consist entirely of one expert witness who, in view of the possible schedule that Mr. Ginsberg has outlined, we will be calling either the latter part of tomorrow morning or tomorrow afternoon when Mr. Ginsberg's expert witness is finished.

As to the law, we will rely on the memorandum of law and as to the specific application of that law to the facts of this case computing damages, I believe that will come out fairly clearlyon our expert witness' testimony and, if necessary, we would reserve our right to make a closing statement. I think it may be appropriate and more helpful to the Court at that time to review the evidence in the light of the law.

Thank you very much.

THE COURT: Mr. Ginsberg, call your first witness.

ANTHONY G. CHURCH,

called as a witness by the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GINSBERG:

Q Mr. Church, at the present time are you employed by the Consolidated Edison Company of New York?

A. Yes, I am.

Q. For how long have you been so employed, Mr. Church?

A. Approximately six years.

Q. Mr. Church, are you familiar with two gentlemen, Mr. Ronald Lavender and Mr. John Luger?

A. Yes, I am.

Q. And concerning Mr. Lavender, could you tell us in what way you knew him?

A. Related to the job, you know. He was a fellow co-worker and I worked with him for approximately three years.

Q. Can you tell us what particular job you had during those three years and what job Mr. Lavender had?

A. Well, the first year I was a mechanic, just a helper in the gang and after the first year I became equipment operator which involves driving a truck. My job consisted of getting the cable ready to be fitted into the hole.

Q. What was Mr. Lavender's function?

A. He was a mechanic. His job, his function is to see the cable is going in right and see that it comes out right.

Q. When you speak of cable, is this cable that you put under the ground here in Manhattan?

A. Yes, electrical cable for service to the street.

Q. Mr. Church, during the time of those three years you worked with Mr. Lavender, could you tell us what type of worker he was?

MR. SCHAFFER: Objection.

THE COURT: I will take it. Overruled.

A. I feel that he was a very hard worker. Once we got involved into a job he would just, you know, go out to get it done.

Q. I think you mentioned that you also were acquainted with Mr. Luger.

A. Yes.

Q. Had you known Mr. Luger as long as Mr. Lavender?

A. No, I didn't.

Q. Approximately how long had you known him?

A. I would say for about two months.

Q. Did you have a steady crew at Con Ed that always worked together?

A. Yes, I did.

Q. Was Mr. Lavender part of your steady crew?

A. Yes, he was.

Q. Was Mr. Luger part of your steady crew?

A. No, he wasn't.

Q. Would Mr. Luger fill in from time to time if a member of your crew was absent?

A. Yes.

Q. Were those the occasions that you knew him?

A. Yes.

Q. Did you know either Mr. Lavender or Mr. Luger socially in any way?

A. None other than the job.

Q. When Mr. Luger filled in, did he always do the same job or would he do different types of jobs?

A. Primarily he'll do the same job because his title was B Mechanic, which was just a helper in the gang.

Q. Is that something different than the A Mechanic?

A. Yes.

Q. What would a B Mechanic do?

A. Assist the A Mechanic whenever necessary at the time.

Q. Again, on those occasions when you observed Mr. Luger, was he a good solid worker or something else?

MR. SCHAFFER: Objection.

THE COURT: I will sustain that.

MR. GINSBERG: That's leading. I withdraw it.

THE COURT: What kind of worker was he?

THE WITNESS: He was eager to get into the job. It was something new to him and he was eager to learn what was happening on the job.

Q. Mr. Church, on the 31st of October 1974, what shift were you working for Consolidated Edison?

A. I believe that was a midnight shift.

Q. Would that be from midnight until about eight in the morning?

A. Yes.

Q. Could you tell us what your specific job function was, your crew? Would you receive calls and go to various places?

A. At the beginning of the day we will receive a work sheet of approximately six to ten jobs on it and we will just ride from location to location either pulling cable or installing new cable.

Q. Mr. Church, at somewhere around 3 o'clock or shortly thereafter in the morning, was your crew in the vicinity of Ninth Avenue and 36th Street in Manhattan?

A. Yes, we were.

Q. And right before the accident occurred, where were you, yourself, physically?

A. Before the accident occurred?

Q. Right.

A. I was on top of the hole. I was getting the necessary equipment needed for me to do the job.

Q. Did you go down into the hole before the accident happened?

A. Yes.

Q. When the accident actually occurred, were you in the manhole?

A. I was in the manhole.

Q. What did you know about something occurring?

A. I was getting like a slight dim light from the overhead street lamp that was outside and a few minutes after I went down into the hole, I noticed the hole got dark and I heard like something was falling, like the guardrail we had in front of the hole, got knocked over or something and I came up.

Q. When you came up, can you tell us first in general what you saw?

A. I saw underneath the bottom of the truck.

Q. Did you somehow get yourself up into the street?

A. Yes.

Q. And at that point, what did you see?

A. I saw Lavender, he was laying partially underneath my truck and the mail truck and I saw Sammy Sperra the foreman who was laying on the side of the mail truck.

Q. Is Mr. Sperra your foreman?

A. Yes, he is.

Q. Is that the gentleman seated in the second row?

A. Yes, he is.

Q. When you saw Mr. Lavender, can you describe his condition at that moment that you first saw him?

A. Well, at that moment everything was still, you know. He was just laying there and I just stood there dazed a moment for a couple of seconds and then as I started to approach him, I heard him start to moan, cry out.

Q. Were you able to hear anything specifically that he said?

A. Yes. He was saying, oh my God, oh my God, don't leave me, I want my baby. He was mumbling a lot of words at that particular time.

Q. Did you see Mr. Luger at all?

A. Yes.

Q. Can you tell us where Mr. Luger was?

A. I seen Luger on the right-hand side in the back of my truck, between my truck and the mail truck.

Q. And the mail truck and your truck, how close together were they?

A. They were making contact.

Q. Was Mr. Luger in-between the two trucks?

A. Yes, he was.

Q. In what position was he? By that I mean, was he lying down or was he in a vertical position or crouched over?

A. He was in an upright, standing position.

Q. Did you observe Mr. Luger's condition?

A. Yes, I did.

Q. How would you describe that?

A. Well, Luger, he had a habit of putting a straw in his mouth at the end of every coffee break that we had. Like after we have a coffee break you get a little stirrer to stir the coffee up and after that he would put it in his mouth for the remainder of the night.

When I approached him, the little straw was going around and around in his mouth and I called out to him and when I did that his jaw started to move a little faster.

Q. Did you notice whether his eyes were open or closed?

A. His eyes were open.

Q. Aside from moving a straw as you indicated, a stirrer I guess is a better word, aside from moving that, was he moving any other part of his body?

A. At one particular point all I saw was his eyes.

It like gazed over to where we were standing because we couldn't get right in front of him because of the truck.

Q. How close was the place where Mr. Lavender was and the place where Mr. Luger was?

A. I would have to say approximately a couple of feet, three feet.

Q. Did you remain in that general vicinity for awhile?

A. Well, immediately after I saw that I couldn't do anything for Lavender or Luger, I left and I went to the phone to call my office.

Q. Did you stay at the scene when either the police or the ambulance or both arrived?

A. Yes, I did.

Q. Did you ever observe Mr. Lavender again?

A. Not after he left the scene. I saw him the whole time when he was there, when they took him from out between the trucks and put him on the stretcher.

Q. What, if anything, did you observe about Mr. Lavender when they were putting him on the stretcher? Maybe I can go back one step before that. Let me withdraw that.

During the time that you observed him, did he move at all or try to move or anything that you could see?

A. Yes, he tried to get up at one point and me and a couple of other guys there stopped him from trying to get up because he was trying to move.

Q. To return to my other question, when he was being put on the stretcher into the ambulance, what, if anything, did you observe about him?

A. The more they handled him, the louder I heard his groans and his moans.

Q. At that point did he say anything, if you recall?

A. At that particular point?

Q. Yes, if you remember.

A. He was constantly talking. At that time I didn't know what he was saying.

Q. As far as Mr. Luger is concerned, you indicated that he was between the two trucks.

Did anybody do anything about extricating him from those two trucks?

A. None other than the police and the Fire Department.

Q. That's what I meant. In other words, the police and Fire Department got him out from between the two trucks?

A. Right.

THE COURT: Mr. Church, so I have a better picture, I take it there was a Con Ed truck that was parked a little bit behind this manhole?

THE WITNESS: Right.

THE COURT: And it got pushed over the manhole by the truck getting hit in the rear?

THE WITNESS: Yes.

THE COURT: Is there a flat back on that truck?

THE WITNESS: A flat-bed with rails on it.

THE COURT: What I'm trying to figure out is how come Mr. Luger was standing up between the two trucks. Was he caught between the two trucks?

THE WITNESS: Yes. In the back of my truck is a "U" shape and the corner of the left-hand side was where he was, right in the corner of the truck. In other words, there is only about a foot on each "U" coming out from the body of the truck and right in that spot was where he was standing.

THE COURT: And the mail truck had pinned him into that spot, is that it?

THE WITNESS: Right.

THE COURT: And he couldn't get out from there?

THE WITNESS: Yes.

THE COURT: And you couldn't help him?

THE WITNESS: No.

Q. What did you observe the police and fire companies do as far as separating the two trucks?

A. Well, when the cop got on the scene, he shut down the truck, turned off all the lights, killed the engine and everything, and they tried to drive my truck apart from the mail truck but when he did that, both trucks started to move.

Q. Both trucks started to move you say?

A. Yes.

Q. What did they do then?

A. They stopped and waited for the fire truck to hook a winch up to the back of the mail truck and then they pulled it apart.

Q. Mr. Church, there are various photographs which I would like to show you and if I may just state for the record, these are photographs attained by the Police Department pursuant to our request.

THE COURT: Any objection that these go in? You have looked at these?

MR. SCHAFFER: I don't know if I have seen these, your Honor, if I may look at them now. (Handed.)

THE COURT: Mr. Ginsberg, you may want to identify at what point they were taken. It seems to me there should be no argument as to authenticity.

MR. SCHAFFER: Your Honor, I have no objection as to authenticity. I'm not sure of their relevance but for background purposes for your Honor to visualize the scene.

THE COURT: All right.

MR. GINSBERG: May I offer them in evidence and then I will ask the witness some questions.

xxx (Plaintiff's Exhibits 1, 2, 3 and 4 received in evidence.)

MR. SCHAFFER: Your Honor, may we have a time frame when these photographs were taken?

MR. GINSBERG: I am about to ask him that.

MR. SCHAFFER: Thank you.

BY MR. GINSBERG:

Q. Mr. Church, at what point were these photographs taken specifically in reference to whether it was after or before the vehicles had been pulled apart by the Police and Fire Departments?

A. After the accident.

Q. It is after the accident, but is it before or after the vehicles had been pulled apart?

A. These pictures here?

Q. Yes.

A. After.

THE COURT: May I see those, please?

(Handed.)

THE COURT: Mr. Church, I am looking here at Exhibit 3 and the middle picture.

That is the back of your truck, right?

THE WITNESS: Yes.

THE COURT: Mr. Luger was where, right in here inside of that little projection on the right-hand side as you look at it?

THE WITNESS: Right.

THE COURT: And he was standing out because the front of the mail truck was right up tight against the back of your truck?

THE WITNESS: Right.

THE COURT: I understand.

BY MR. GINSBERG:

Q. Mr. Church, you had spoken about cable earlier.

Where does the cable come from on the Con Ed truck?

A. The reel itself or where do I pull the truck out from?

Q. I guess I'm speaking about the reel itself.

A. The reel itself comes from the 16th Street yard.

Q. I don't mean that.

In other words, when you're unreeling the cable.

A. It comes from the body of the truck off a spool, like a spool that's on the back of my truck.

Q. It would be at the back of your truck?

A. Right.

Q. Would it be a fair statement that the person who is unrolling it or unreeling it would be standing at the rear of the truck to do that?

A. Yes.

Q. Was that Mr. Luger's job function at this particular occasion?

A. Yes.

Q. Just a couple of other questions, Mr. Church.

Did you, yourself, observe any signs, physical signs of injury to either Mr. Luger or Mr. Lavender? I don't know if you looked at them that closely, but if you did tell us.

A. Physical signs?

Q. Any bleeding or black-and-blue marks or anything.

MR. SCHAFFER: Objection.

Your Honor, I believe there are autopsy reports available and rather than have the reactions of a witness, unexpert in these matters, I think the extent of the nature of the injuries would be uncontested.

THE COURT: Doesn't this go to conscious pain and suffering at the time which I obviously have to consider here?

MR. SCHAFFER: I believe he has already testified as to the facts which would go to conscious pain and suffering.

THE COURT: I think it appropriate if there -- were certain evidence of injuries at the time.

You may answer, sir.

A. Yes, on John Luger.

Q. Tell us what you saw.

A. Well, before the police separated the trucks, all I saw was bleeding.

THE COURT: Where did you see the bleeding, Mr. Church?

THE WITNESS: The lower part of his body. And, after they pulled the trucks apart, then I could see that he had openings in his lower part of his body. I could see the flesh.

MR. GINSBERG: Thank you, Mr. Church, I have no further questions.

CROSS EXAMINATION

BY MR. SCHAFFER:

Q. Mr. Church, you testified you and Mr. Lavender worked approximately for three years in this group.

A. Yes.

Q. Mr. Church, during the three years that you and Mr. Lavender worked together, did you on any occasion observe him miss a day's work?

A. As far as being out sick?

Q. Yes.

A. Yes.

Q. Can you recall approximately how often Mr. Lavender was out sick?

A. As far as specific days, no, but it was not something that much that would bring my attention to him being off.

THE COURT: You say he was sick a lot?

THE WITNESS: No.

THE COURT: He was not sick?

THE WITNESS: No, not for me to --

THE COURT: Nothing unusual?

THE WITNESS: Right.

Q. Mr. Church, you have testified when you came up from the manhole, you had occasion to see both Mr. Lavender and Mr. Luger and that you then left the scene to make a phone call.

A. Yes.

Q. From the time that you came up out of the manhole until the time you went to make a phone call, about how much time passed?

A. Between the time that I did see them and the time that I left?

Q. That's right.

A. I figure I stayed with them for about five or -- ten minutes before I left to go to the phone.

Q. And during that five or ten minutes, did you spend the entire time observing Mr. Lavender and Mr. Luger or did you spend part of that time doing other things?

A. I didn't do anything else really. I tried to see if I could do anything to Luger -- I mean Lavender but he seemed to be in pain so I didn't want to touch him.

Q. Mr. Church, may I request that you just answer yes or no questions yes or no.

MR. SCHAFFER: I would ask that answer be stricken as nonresponsive.

THE COURT: Strike it. Go ahead.

Q. Approximately how long did you spend making the phone call?

A. About two minutes.

Q. And thereafter, did you come back to the scene of the accident?

A. Yes, I did.

Q. And from that time until the time you finally left to go back to work and go home or wherever you went, about how much time passed?

A. Between the time I made the phone call and the time I went home?

Q. Yes.

A. I believe I went home about 8 o'clock. This happened around 3:00, 3:30. I don't know the exact time of the accident.

Q. From the time you made the phone call, did you remain at the scene of the accident until 8 o'clock in the morning?

A. No. I went to the office.

Q. From the time you made the phone call until the time you went into the office, how much time expired?

A. About an hour.

Q. So that subsequent to the time of the accident, you spent five to ten minutes at the scene of the accident, you left to make a phone call for a couple of minutes and then you came back and spent about an hour at the scene of the accident before going back to your office?

A. Yes. Somebody came to pick us up, yes.

Q. Approximately how long after you came back from making the phone call did the police and firemen arrive?

A. Approximately five minutes.

Q. After the police and firemen arrived, approximately how long did it take for the ambulance to arrive?

A. Well, they came almost simultaneously.

Q. Was Mr. Lavender placed in the ambulance before the two trucks were pried apart?

A. No. The two trucks were pried apart first.

Q. Approximately how long from the time of the accident did it take before they pulled the two trucks apart?

A. I would say a half hour. I don't really know.

Q. Was Mr. Lavender then taken by the ambulance very shortly after the trucks were pulled apart?

A. Yes. They were in attendance while they were pulling the trucks apart.

Q. Was Mr. Luger placed in the same ambulance as Mr. Lavender?

A. No, I don't think so.

Q. Was he placed in an ambulance at about the same time Mr. Lavender was or sometime later?

A. Maybe about five minutes later.

Q. And approximately how long after Mr. Luger was placed in the ambulance did you leave the scene of the accident to go back to the office?

A. After Luger was placed in the ambulance?

Q. Yes.

A. That was about an hour before they came out -- you're talking about before I left the scene of the accident?

Q. In other words, after the two individuals had been placed in the ambulance, how much longer did you then stay at the scene of the accident?

A. I stayed out there on 39th Avenue for about an hour.

Q. About an hour after they left the scene of the accident, after the ambulance arrived?

A. Yes.

Q. Let me backtrack again.

From the time of the accident until the time that Mr. Luger was placed in the ambulance, about how much time expired?

A. All I could do is guess on this particular time.

As far as the time is concerned that expanded between the different intervals, I don't know, maybe about a half hour.

Q. Did you have the opportunity to observe Mr. Luger after the trucks were pulled apart?

A. After the truck was pulled apart?

Q. Yes.

A. No, because the attendants were all around him.

Q. So you only saw him at the time he was vertical, pinned between the two trucks?

A. After the trucks got apart, he was just laying on the floor and I seen him then. After they put him on the stretcher, I didn't see him any longer.

Q. At any time did you hear Mr. Luger make any sound?

A. Any sound?

Q. Yes.

A. No.

Q. At any time did you observe Mr. Luger make any movement other than the eye movement and the movement of the stirrer in his mouth as to which you have already testified?

A. No.

MR. SCHAFFER: I have no further questions.

THE COURT: Any redirect?

MR. GINSBERG: I have no redirect, your Honor.

THE COURT: Thank you, Mr. Church.

(Witness excused.)

SEBASTIAN SPERRA,

called as a witness by the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GINSBERG:

Q. Mr. Sperra, by whom are you employed, sir?

A. Con Edison.

Q. For how long have you worked for Con Edison?

A. Thirty-one years.

Q. Can you tell us your present job title?

A. Foreman.

Q. And for how long have you been a foreman, Mr. Sperra?

A. Since 1968.

Q. Mr. Sperra, are you a foreman of a particular department or section or whatever it is called of Con Ed?

A. Cable crew, yes, sir.

Q. Could you tell us what a cable crew consists of? How many men?

A. Cable crew consists of two chauffeurs, two

A Mechanics and one B Mechanic.

Q. I think you left yourself out. One foreman.

A. I don't count really.

Q. So it would be a six-man crew including the foreman?

A. Five men, six with the foreman, yes, sir.

Q. How does a person become a foreman? In other words, what is the step before a Con Ed employee becomes a foreman?

A. Well, you become a foreman by improving yourself, show them that you're a good worker. They used to tell me keep your nose clean.

Q. It was a bad question to which you gave a good answer.

What I meant was, what was your job classification before you were a foreman?

A. To start from the very beginning, I was a laborer. Then I went driving. Then I went through a cable crew. From there I went to a splicing school. From splicing I went to another school for emergency crews and from there I went back to the cable crew and after six months they made me foreman.

Q. When you went back to the cable crew, were you a chauffeur or Class A Mechanic or Class B Mechanic?

A. Troubleshooter they call it, a red wagon, troubleshooter.

Q. Were you ever a Class A Mechanic yourself?

A. Yes, sir.

Q. Based on your thirty years at Con Edison, what percentage would you say of Class A Mechanics ultimately become foremen?

A. I would say 50 to 60 per cent should make foreman.

Q. When you do make foreman, what happens to your salary?

A. A foreman makes 30 per cent more than the A Mechanic.

Q. Mr. Sperra, was Mr. Lavender a steady member of your crew?

A. Lavender came to me a year previous to the accident as an A Mechanic.

Q. Had you known him at all before that?

A. I know him since he got the job, he came to me and then he left me and then on and off he came back and then he came steady.

Q. For a year before the accident, he was steady with you?

A. Yes, sir.

Q. Mr. Sperra, can you tell us the shifts that your crew works? By that I mean, do you always work the night shift or the evening shift or day shift or do you rotate your shifts?

A. We work five and a half weeks on days. That's from 7:00 to 3:30. Then we go on midnight, 11:00 to 7:00 a.m. in the morning for seven days straight. After that, we go 3 o'clock to 11 p.m..

Q. For how many --

A. For another seven days.

Q. And then do you start all over again, you go -- back to the day shift?

A. Yes, sir.

Q. Does your whole crew do the same thing together?

A. Yes, sir.

Q. Mr. Sperra, just briefly, what type of a worker was Mr. Lavender during that last year that he was a member of your crew?

A. An A Mechanic is considered as a rigger. He has to be able to go down the hole, put a rigger up so that we put a block and the steel line goes through that block and it makes a straight pull so it doesn't damage the cable.

Q. Did he do his job well or not well? Was he conscientious or not conscientious? How did he do his job?

A. Well, he was just made A Mechanic a year, and I could say that he improved very much. I would be satisfied with him.

Q. Mr. Sperra, as far as Mr. Luger is concerned, was he a member of your regular crew?

A. No, sir.

Q. Did he substitute for B Mechanic from time to time?

A. Yes, sir.

Q. How long did you know him?

A. I knew him for three, four months.

Q. Had you worked with him a number of times?

A. On and off.

Q. And what kind of a job did he do? Did he do a good job or a bad job?

A. Actually Mr. Luger was a chauffeur at the time, but he had no title yet. Being that he was a new man, whenever they needed a B Mechanic, they replaced him, pushed him around for awhile. He was a good worker I could say, yes.

Q. Mr. Sperra, at the time that the accident happened, were you inside the manhole or were you outside?

A. I was outside.

Q. What do you know about an accident happening? Did you hear something or feel something or --

A. I was facing south and Mr. Lavender was facing north, right in front of me, two feet away from me, not even. I was on the cable for him so he could tape it. All of a sudden he said, "Look out, Sammy," but I never had a chance to turn or move. I just put my hands on my head to protect my head because I didn't know what to expect and I heard a crash. I was knocked down. I must have been out a few seconds because when I opened my eyes, I was right next to the wheel of the mail truck. I don't know what the heck happened.

I saw Lavender laying under the truck facing me and I start crying, calling him, ask him how he was. He was crying, he wanted his baby. I tried to get up. I couldn't get up because I had a pain in my leg and they told me to stay down but I couldn't stay down. I had to get up to see how Lavender was.

I had forgot about Mr. Luger but then I remembered and I asked where is Luger and the guy said forget about Luger, and I looked between the trucks, just the first look and I saw Luger. I just couldn't look no more. I turned around, they put me in a police car and they told me to stay there.

Q. Did you notice any physical injuries to Mr. Luger?

A. Mr. Luger couldn't get up. He said his back was bothering him.

Q. I mean Mr. Luger.

A. Oh, Mr. Luger. I just saw his face. That was enough for me. I couldn't see no more. I was crying all the time.

Q. As far as Mr. Lavender was concerned, you started to say what you noticed about him.

A. I talked to him and he says I'm all right, Sammy, a pain in my back, I want my baby, I don't want to die. I said you'll be all right, the ambulance will be here in a few minutes. And, that was it.

Q. You said you went in the police car.

Did a time come when you went in an ambulance to a hospital?

A. Yes.

Q. Who was in the ambulance with you?

A. Mr. Luger, Mr. Lavender, the mail driver and one attendant.

Q. At the ambulance ride to the hospital, did you observe anything about Mr. Luger?

A. Yes, sir.

Q. Tell us what you observed on the ride to the hospital?

A. Well, there was slight noise coming out of his mouth.

MR. SCHAFFER: Excuse me, your Honor, could the witness speak a little more louder, I'm having trouble hearing.

THE COURT: Yes.

A. He was moaning and I also noticed that when the ambulance made a left turn, his foot would go off the stretcher and it looked like the bones were completely broke and was held by the skin. I saw the attendants pick up his foot and put it back on the stretcher. It also happened when the ambulance made another turn, the other way, his right foot would go off the same way. It looked like both bones were broken completely.

Q. Did you make any attempt to talk to Mr. Luger?

A. I just called his name. I was crying, how sorry I was, for both of them kids. It was some night. I wouldn't want to see it again.

THE COURT: Mr. Sperra, did Mr. Luger say anything to you at all?

THE WITNESS: No, sir.

THE COURT: He didn't?

THE WITNESS: Just a slight noise coming out of his mouth. I don't know if he was breathing or the last breath or what. I just couldn't tell.

THE COURT: Could you see him looking at you?

THE WITNESS: No, sir. He didn't look at me.

Q. Mr. Sperra, the sounds that you said were coming out of his mouth, those weren't words, were they?

A. No.

Q. When you called his name or something, or spoke to him, what would happen to those sounds?

A. I couldn't tell you. It was the same, maybe -- I couldn't tell.

Q. Mr. Sperra, did you notice Mr. Lavender at all in the ambulance ride?

A. Yes, sir.

Q. What did you observe about him?

A. The attendant was trying to make him comfortable as much as he could. He didn't say nothing. I didn't talk to him.

Q. Was he talking to the attendant at all that you could hear?

A. I don't know, to tell you the truth, because I was crying like hell.

Q. Mr. Sperra, did you see either Mr. Luger or

Mr. Lavender in the hospital?

A. Yes, sir.

Q. Both of them or one of them?

A. I just saw Mr. Lavender.

Q. Tell us what you observed about Mr. Lavender in the hospital.

A. I was sitting in the hall in a wheelchair waiting to get X-rayed when they brought him down for the X-ray and I asked him how he was. He says I have a little pain, but I'll be all right. And, they took him about ten feet away from me and they removed him from one stretcher to another, five guys picking him up and when they picked him up, I heard him screaming that they hurt his stomach, "You're hurting me," and that was the last time I saw him.

Q. Mr. Sperra, did you know either Mr. Lavender or Mr. Luger in a social way?

A. No, just on the job.

MR. GINSBERG: Thank you, sir, I have no more questions.

CROSS EXAMINATION

BY MR. SCHAFFER:

Q. Mr. Sperra, from the time you first went to work for Con Edison, how long did it take before you became a foreman?

A. It took me twenty years.

Q. And during that time you have testified that you had certain special training.

A. Yes, sir.

Q. Was that training that was provided by Con Edison itself?

A. Yes, sir.

Q. Did you have to qualify in any way in order to obtain that training?

A. You just have to be a good worker, I guess.

Q. At the time that you observed Mr. Luger when he was still between the two trucks, did you observe a straw or stirrer in his mouth?

A. When I saw Mr. Luger, that was the very first look, I didn't observe none.

Q. During the ride in the ambulance to the hospital, you have testified that you were emotionally upset, crying the entire time.

A. Yes, sir.

Q. Prior to the time that you observed the hospital attendants move Mr. Lavender from the stretcher to, I guess it was one of those rolling beds --

A. Yes.

Q. Prior to that time, had you heard Mr. Lavender cry out in pain?

A. No. He wasn't crying.

MR. SCHAFFER: Thank you, Mr. Sperra, no further questions.

MR. GINSBERG: I have no further questions.

THE COURT: Thank you very much.

(Witness excused.)

JOHN M. LUGER,

called as a witness by the plaintiff, being first duly sworn, testified as follows:

MR. GINSBERG: Your Honor, may I inquire of counsel whether he would concede that both parties have been properly appointed administrator or should I introduce the documents in evidence?

THE COURT: Any question about that?

MR. SCHAFFER: Your Honor, I have none but since there are consequences that flow from this case for the administration of the estate, I would think it might be better if they were introduced into evidence.

MR. GINSBERG: I would offer into evidence then the letters of administration by the surrogate of Nassau County to Mr. Luger.

MR. SCHAFFER: No objection.

xxx (Plaintiff's Exhibit 5 received in

evidence.)

DIRECT EXAMINATION

BY MR. GINSBERG:

Q. Mr. Luger, are you the father of the late John W. Luger?

A. Yes, I am.

Q. And is his mother and your wife the woman whom you are here in court with today?

A. Yes, she is.

Q. First, a couple of questions about yourself, sir.

Can you tell us how old you are at the present time?

A. I'm forty-seven.

Q. Mr. Luger, are you presently employed, sir?

A. Yes, I am.

Q. What is your employment?

A. I'm an auto mechanics teacher.

Q. By whom are you employed?

A. BOSES.

Q. Can you tell us what that means?

A. Board of Cooperative Educational Services.

Q. That is a federal program or state program for educating people?

A. Right. It's a vocational program that works in conjunction with the home schools.

Q. Can you tell us what your present salary is as of today?

A. 20,100.

Q. Per year?

A. Per year, right.

Q. Do you recall how much money you were making at the time your son passed away?

A. I guess it was about sixteen two, sixteen three, somewhere thereabouts.

Q. Mr. Luger, how old was your son John at the time he passed away?

A. Twenty.

Q. For how long have you been a teacher at the BOSES system?

A. Since January 1972. Five, six years, I guess.

Q. Had you been an auto mechanic before that?

A. Yes.

Q. By whom were you employed before BOSES?

A. United Airlines.

Q. How long had you worked there?

A. 1954 I started. I guess about seventeen or eighteen years.

Q. Mr. Luger, did your son John attend a high school?

A. Yes, he did.

Q. Then he graduated from high school?

A. Yes.

Q. Did he work at two or three or maybe even four jobs for a short period of time before he went with Con Edison?

MR. SCHAFFER: Objection as to form.

MR. GINSBERG: I will withdraw it.

Q. Mr. Luger, did there come a time when your son became employed by the Consolidated Edison Company?

A. Yes.

Q. And do you remember approximately when that was?

A. I think it was in February, if I'm not mistaken, of '73.

Q. Do you recall when he had graduated high school?

A. That was the year before. 1972.

Q. Would that have been in June of '72?

A. Yes.

Q. Mr. Luger, in addition to John, do you have any other children?

A. Yes.

Q. How many other children do you have?

A. Six.

Q. What order was John in, the oldest, the youngest or --

A. He was the oldest.

Q. At the time of the accident, were any of the other children employed?

A. No.

Q. How old was the next oldest under John?

A. That was Gil. I believe he was seventeen.

Q. Mr. Luger, did you live in an apartment? I haven't asked your address. Where do you live?

A. 48 Adams Street, Floral Park.

Q. Is that in a private house or an apartment?

A. Private house.

Q. At the time that John met with the accident, was your entire family living in that house?

A. Yes.

Q. Could you give us a little bit of an idea as to your son John's schedule? By that I mean, he woke up, he went to work, et cetera. Give us some ideas as to what he did.

A. Is that from the time he worked for Con Ed?

Q. Just for the period he worked for Con Ed.

A. They had rotating shifts where sometimes he worked midnights for one week, afternoon shifts for one week and then five weeks days.

When he worked the midnight shift, he would come home in the morning about 8:00, 8:30. Usually he would have breakfast or something, sit down for a little while and go to bed. He would normally sleep I guess until about 6:00, 7:00 o'clock, have supper, maybe go out for a little while. Usually he came back home and before he left, he would eat and 10:00 o'clock he went to work. Afternoons he would have breakfast or dinner at home. His main meals were lunch at that time and then he would go to work, come home usually shortly after midnight, and once in a while he would go out with a couple of his friends, come back home and then go to sleep and go to work the next afternoon again.

When he was on the day shift, he would just have a light breakfast, go to work. He usually left very early because he had to go over to Manhattan, and come home about 4:00 o'clock, 5:00 o'clock, I guess, have supper with us and then usually he would go out with a couple of his buddies. They would go out for awhile and he would come in maybe 1:00 o'clock or so, go to sleep and go to work the next morning.

Q. Mr. Luger, what would he do, generally speaking, on weekends?

A. He would be home sometimes and he used to like to go camping. So a couple of fellows, they had about four, five fellows that used to pal out together and every once in a while they would spend a weekend camping, and come home. Otherwise he spent a lot of his time sleeping, I guess, when he was home and then meet the fellows in the afternoon and they would go out.

Q. Mr. Luger, as far as the other six children in your family are concerned, were they eating their three meals a day, seven days a week, at home?

A. Yes, sir.

Q. How about you and your wife?

A. I would say yes, except I used to take lunch along to work. I wasn't home for dinner.

Q. As far as your son John was concerned, was he eating three meals at home or less than that?

A. Less than that.

Q. I take it without going back to your summary, his midmeal, lunch meal was something he would not eat at home.

MR. SCHAFFER: Objection.

MR. GINSBERG: I can withdraw it.

Q. During the day shift which was five weeks and then two on the other shifts, when he was out working at Con Ed, would he come home for lunch?

A. No.

Q. Do you know whether he took lunch or ate his lunch out with the other members of the crew?

A. Sometimes he would take lunch and sometimes he would buy his own, I guess.

Q. Mr. Luger, who was in charge of the amount of money that was spent on food in your family? Was it you, your wife or would you sit down together and do it?

A. I guess mostly it was my wife. I would just pass my check in.

Q. Mr. Luger, did your son John contribute any money at the time of his passing to the family?

A. Yes, he did.

Q. Was this on a regular basis?

A. Yes.

Q. How much money was that?

A. It was about $30 a week.

Q. Had he been doing that all along or had it been a different amount at some other period of time?

A. The amounts changed. It was just lately when he got the new job driving the truck, he got a raise then and then he increased it to $30.

Q. In addition to that money, was there any other money that he gave you at all for any other reason in the household?

A. Not really. He was giving me monthly toward the payment of the car and for the car insurance, but not basically for the household, no.

Q. You mentioned the car.

How many cars were in the household at the time John had his accident?

A. Three.

Q. Who would use those three cars?

A. I would use them, John would use them.

Q. If we can take them one at a time.

Did you drive a car to work?

A. Yes.

Q. And was that car in your name?

A. Yes, it was.

Q. Did John drive a car to work?

A. Yes, he drove the other car.

Q. Was that in your name or his name?

A. My name.

Q. When John was not driving it to work, was that car used by other members of the family?

A. It was used by myself. If I needed it, I would just take it.

Q. Who was driving in the family at that time besides you and John?

A. Just the two of us.

Q. Who used the third car, just out of curiosity?

A. Well, the third car was broken down. John was actually using that before and it had broken down to such an extent that I wasn't sure if I would get rid of it or not. Finally I went out and I bought the Plymouth Satellite, and I took the Maverick out to school where I work and I was in the process of rebuilding it.

Q. So you only had two functioning cars, the third one was out at the school?

A. Yes.

Q. On those occasions when you would use the car that John was paying for, would other members of the family go with you on trips or whatever?

A. Yes, they would.

Q. Aside from the money for the car and the money of the $30 a week that he was contributing, would John keep the rest of the salary himself, and pay for all his expenses out of that?

A. Yes, I would say so.

Q. On those weekends when he went off camping for a few days, would he eat his meals wherever he was camping?

A. Yes.

Q. Would you know, Mr. Luger, in terms of your discussing it with your son John as to whether the job he had gotten with Con Edison as far as he was concerned, was a permanent position that he had planned to stay in?

A. Yes. He wanted to stay at that. As a matter of fact, the last job he got, he was extremely happy with. In other words, when he got onto the truck, cable truck.

Q. Mr. Luger, at the present time, are any of your children attending college?

A. Yes, my daughter Eleanor.

Q. And are there charges for tuition and books or whatever --

MR. SCHAFFER: Objection.

THE COURT: How is that relevant to the issues?

MR. GINSBERG: I think it might be relevant, your Honor, to show the economic situation of the family. I know there are families where brothers contribute to their younger sibling's education if the family's means is not sufficient. I realize, of course, that in a death action, there is always some degree of speculation but I think it's something perhaps to consider.

THE COURT: At this point I'll take it. Go ahead.

Q. Are there tuition and book charges and other things for your daughter's college?

A. Yes.

Q. Mr. Luger, were you making more money when you were with United Airlines than you are as a teacher?

A. Right now I was making less for United than I am right now.

Q. But when you switched from United to becoming a teacher, did you take a cut in salary?

A. Yes.

Q. And at the present time, Mr. Luger, does all of your salary go to support your family or are you able to save a lot of money?

A. No, it all goes toward my family.

Q. Mr. Luger, on the 31st of October 1974, in the early hours of the morning, did you receive some notification that your son had been in an accident?

A. Yes, I did.

Q. Did you proceed someplace from your home?

A. Yes, I went down to St. Claire's Hospital.

Q. Did you meet anybody at St. Claire's Hospital?

A. I met some of the fellows from Con Ed first and then I had to go into the back room and there was a nun back there.

Q. A nun?

A. Yes, a Sister, in the back and she talked to me for awhile. I asked her how serious an accident it was. She said it was very serious. At that point I said well, you know, was it that serious and she just said yes, and the doctor will talk to you in a couple of minutes.

Q. Did a doctor ultimately come down to talk to you?

A. Yes, he did.

MR. SCHAFFER: Objection, your Honor. I fail to see the relevance of this testimony.

THE COURT: I will take it. I realize it's hearsay but I'll take it.

MR. SCHAFFER: I also question its relevance to the question of damages.

THE COURT: I don't see that it has a question on damages.

MR. GINSBERG: It was only one more question.

THE COURT: All right.

Q. Did the doctor tell you your son had died as a result of the accident?

A. Yes, he did.

Q. When you came to the hospital, was that by yourself or were you with your wife?

A. I was by myself.

Q. Then after leaving the hospital, did you go home to tell your wife what had happened?

A. Yes.

Q. I take it from what you said that you never saw your son alive after the accident.

A. No.

Q. Mr. Luger, if I may show you this photograph, sir, and ask whether that is a picture of your late son.

A. Yes, it is.

Q. Was that taken in 1972, about two years before the accident?

A. Right, when he graduated.

MR. GINSBERG: I will offer that into evidence.

MR. SCHAFFER: Objection.

THE COURT: Overruled.

xxx (Plaintiff's Exhibit 6 received in evidence.)

MR. GINSBERG: Your Honor, I would like to offer at this time a copy of the funeral bill that was submitted to the Workmen's Compensation Board by the undertaker. Let me note for the record that there is a compensation allowance given to the family but it is not in the amount of this bill. It's a specified few hundred dollar allowance.

MR. SCHAFFER: No objection.

xxx (Plaintiff's Exhibit 7 received in evidence.)

Q. Mr. Luger, the funeral bill, Plaintiff's 7, were the funeral expenses paid by yourself and your family?

A. Right.

Q. Mr. Luger, in the private home that you lived in, sir, from time to time was various work done in terms of repairs or building additions or painting the house, things of that nature?

A. Yes.

Q. Could you tell us what, if anything, your son John did in terms of helping in those areas?

A. Well, he would help me if I was doing some major job, you know, like putting up walls down the basement or something like that. A lot of times he would help by cutting lawns and basically that was it.

Q. Would it be fair to describe your family as sort of a cooperative enterprise, everybody pitched in and did some of the work around the house?

MR. SCHAFFER: Objection.

THE COURT: I will sustain it.

MR. GINSBERG: I withdraw that.

Q. Mr. Luger, did your son John have any particular skill that was used? I mean was he a good carpenter, mechanic or painter or any of those?

A. No.

Q. Just a general laborer?

A. Like a helper.

Q. Mr. Luger, were there ever any occasions where the family would go on a visit, picnic or trip where John himself would drive other members of the family?

A. Yes. A couple of times we would go out to Sunken Meadow or something like that, and if we had to, he would take the car and we would go together.

Q. Mr. Luger, at the time of the accident, was John either married or engaged or going steady or -- I guess you don't get pinned unless you're in a fraternity -- but was he involved in any serious way with a girl that you knew of?

A. No.

Q. Had he introduced you to any girlfriend at all up until the time he met his death?

A. No.

MR. GINSBERG: That's all I have. No further questions.

THE COURT: Do you have much cross examination?

MR. SCHAFFER: I would estimate about ten minutes.

THE COURT: We will take our recess at this point. Will counsel come into the robing room.

(Recess.)

(In open court.)

MR. GINSBERG: Judge, I have just thought of one more question.

THE COURT: All right.

BY MR. GINSBERG:

Q. Mr. Luger, aside from the saving on your son's share of the food, was there any other saving of any kind that you as a family had when your son passed away?

A. I guess not.

Q. In other words, your taxes were the same and your heating and electric and everything else is all the same?

A. Yes, sir.

MR. GINSBERG: That's all. Thank you very much.

CROSS EXAMINATION

BY MR. SCHAFFER:

Q. Mr. Luger, I believe you testified on direct examination that you are forty-seven years old, is that correct?

A. Yes.

Q. Could you describe the condition of your health?

A. Of my what?

Q. Health.

A. Good, as far as I know.

Q. How old is Mrs. Luger?

A. Forty-eight.

Q. Could you describe the condition of her health?

A. I would say good.

Q. Do either of you have any serious illnesses?

A. My wife has -- I don't even know if she still has it -- high blood pressure. It seems to be okay now.

Q. And you have no serious illnesses?

A. No.

Q. Do either you or your wife smoke?

A. I do.

Q. You testified that you were currently employed as a teacher of auto mechanics, is that correct?

A. Right.

Q. Could you describe more specifically by whom you are employed? New York City, New York State?

A. I don't know the direct connection. I guess it comes under the State, being BOSES is outside the city line, all of the State. We teach all vocational subjects. The home school has no ability to teach a particular vocational subject like auto mechanics or electricity or any of that stuff. What they do is, they contract with BOSES to have their children bussed over to us and we teach them for three hours a day and then we get an afternoon session, another three hours.

Q. When you first went to work as an auto mechanic instructor, what was your yearly salary?

A. I guess it was around eleven, three or eleven, five, I don't remember exactly.

Q. $11,300 per year?

A. Yes.

Q. And your current salary is how much a year?

A. 20,000.

Q. Obviously then you have received periodic increases in your salary, is that correct?

A. Yes, I have.

Q. On what have those increases been based?

A. Some of them on my college credits. In other words, what they call increment raises.

Q. Are you currently taking college courses?

A. Not this semester.

Q. You have been over the last few years?

A. Yes, I have.

Q. Are those courses directed towards obtaining a B.A. degree?

A. Yes, they are.

Q. Isn't it a fact that for each fifteen credits of college courses, you get a raise in salary?

A. Yes.

Q. And will you get a further raise once you obtain your bachelor's degree?

A. No, except the fifteen increments up to the level. I'm at the level now, I guess.

Q. Will you be entitled to further increments in salary if you go on thereafter for a master's degree?

A. I really don't know how to answer that. I would only be going for my master's if I wanted to get into administration or become a principal.

Q. Do you currently have any intention of doing that?

A. I really don't know. I'm like this.

Q. That is to say you are considering it but you are undecided?

A. Right.

Q. In addition to the increases in salary that you get for your college credits, do you also get increases in salary based on seniority?

A. I guess every year up until the sixteenth year, the sixteenth step we would get an increase.

Q. In addition to those increases, do you also get periodic increases as the collective bargaining agreement is renegotiated?

A. Yes.

Q. Apart from your salary, do you have any other source of income?

A. Presently, no. I was working as an adult ed. instructor for Great Neck one evening a week.

Q. When was that?

A. Pardon me?

Q. When was that?

A. That was up until last year.

Q. But you are no longer doing that?

A. No.

Q. How much per year did that bring in for you?

A. It was about $300 a semester. About $600 a year.

Q. Do you also have interest income on your savings account?

A. Yes, I do.

Q. Approximately how much do you presently have in your savings account?

A. 22,000.

Q. Approximately what rate of interest are you earning on that savings account?

A. I guess about five, five and a quarter.

Q. Over the last -- how many years has it been that you have been working as a teacher?

A. About six. I think this is my sixth semester.

Q. Over the past six years, have you made any contributions or additions to that savings account?

A. I don't know how to answer that. The savings account that I have is there because I got insurance money for my son's death. Up until that time I only had about $1,000 in the savings account.

Q. Does your work as a teacher involve employment during the summer as well?

A. No.

Q. How many months off do you have during the summer from that job?

A. About two and a half months, ten weeks.

Q. Since you've been working at that job, have you taken any summer employment?

A. No.

Q. As an employee of BOSES, do you participate in a health insurance program?

A. Yes.

Q. What kind of coverage does that program have?

A. It has medical coverage and there is a dental plan.

Q. I'm sorry --

A. A medical coverage and dental plan. I have GHI which will cover doctor bills.

Q. And hospital coverage?

A. Blue Cross. I don't know the name of the outfit. They just changed the dental plan this year.

Q. In addition to the health insurance, is there also a pension plan for BOSES employees?

A. Yes, there is.

Q. Under that pension plan, how many years would you have to work as a teacher to qualify for a pension?

A. Twenty years.

Q. And you now have approximately six years to your credit?

A. Yes.

Q. Do you also have life insurance, Mr. Luger?

A. Yes, I do.

Q. Is that through your work or is that private life insurance?

A. That's private.

Q. To what amount are you insured?

A. I think it's something like $30,000 and I guess double indemnity, if I die in an accident, it doubles.

Q. This is purely a death benefit type insurance?

A. Yes.

Q. And coverage upon your death will be $60,000?

A. Accidental.

MR. GINSBERG: Excuse me. He said $30,000 unless it's an accidental death.

Q. Do you own your own home, Mr. Luger?

A. Yes, I do.

Q. The mortgage is completely paid off at this point, is it not?

A. At this point, yes.

Q. You testified, I believe, that at the time of his death, your son was contributing approximately $30 a week to the household expenses, is that correct?

A. Yes, that's correct.

Q. I believe you also testified that at an earlier time he had contributed somewhat less.

A. Yes, that's right.

Q. You testified that when you changed jobs from United Airlines to your teaching job that you took a cut in salary.

A. Yes.

Q. How much were you earning at United Airlines at the time you left that employment?

A. I believe it was 14,700, including the overtime.

Q. Was it at that time that you requested your son John to make contributions to the family expenses?

A. Well, I didn't request him directly. When we were making a decision to change jobs, I knew of the cut that I would have to take, and we weren't sure whether we wanted to take that cut or not. So, the night I was interviewed, I came home and we got all the kids together and we discussed the situation.

We told them we would be tight as far as financial was concerned because we were taking the cut and we felt that we would like to have their approval and we said that being tight we would expect, you know, assistance from the rest of the family, we would all have to work together.

Q. So that your anticipation is all of the children will contribute to the household expenses as they earn income?

A. Yes, I would think so.

Q. Are any of the children contributing now to household expenses?

A. Yes, my son Gil.

Q. About how much is he contributing?

A. About $15 a week.

Q. Is it your anticipation when your daughter graduates college she would make some contribution?

A. I would imagine so.

Q. And so on with the other children?

A. Yes.

Q. Mr. Luger, was it your anticipation that at such time as your son John would have gotten married that he would have set up his own household?

MR. GINSBERG: [illegible] must object to that, your Honor, unless there was any foundation of any discussion or thoughts or contemplations or plans of marriage before the death of his son John.

MR. SCHAFFER: As your Honor has noted, we are necessarily in a somewhat speculative harm here.

I think there is no individual better equipped to engage in some reasonable speculation along these lines than Mr. Luger himself.

MR. GINSBERG: With due deference, your Honor, the Court or if we had a jury, the jury would have to speculate in this type of case but I don't think that eliminates the rules of evidence as far as what a witness can testify to.

THE COURT: Let's see whether he can give us a meaningful answer and if it isn't, I will disregard it.

You may answer.

Q. The question is, at such time as your son would have gotten married, would you have anticipated he would have set up his own household rather than living with you?

A. Yes, he would.

Q. Would you also have anticipated that at such time as he set up his own household, he stopped making contributions to your family expenses?

MR. GINSBERG: That I would object, your Honor, only on the ground it really does not involve circumstances. I don't mind if the witness is asked if he loses his job, or obviously he becomes a millionaire and wins the lottery I wouldn't expect him to contribute but it is not a meaningful question.

MR. SCHAFFER: Your Honor, let me correct that.

Q. Assuming that you are in good health, and employed in your current place of employment and received the periodic increases in salary to which you are entitled.

Keeping those assumptions in mind, would you anticipate that when your son would have set up his own household, he would have stopped contributing to your family's expenses?

MR. GINSBERG: I will object as to being no foundation whether these items were thought of, or discussed prior to John's death.

MR. SCHAFFER: It's the same objection to the last question which was answered, your Honor.

THE COURT: I will take it.

You may answer.

A. If the situation was the way I am now, in good health and everything else and he lived by himself, no, I don't think I would expect him to contribute to my support. However, I think if something happened to myself or I did get sick, that I could go to him and expect some help from him the same as I would do for my own parents.

Q. I believe you testified with respect to your son's additions to the expenses for your family that he took two meals, approximately two meals a day at home.

A. Yes, I would say so.

Q. A breakfast meal and then one of the main meals, is that correct?

A. Yes.

Q. Do you know approximately how much per week your family currently spends on food?

A. I would say roughly about $125, give or take a few. I sometimes go to the store myself and pick something up when it's necessary.

Q. Mr. Luger, which member of your family is primarily concerned with providing houshold services such as cleaning, cooking, small repairs and things of that nature?

MR. GINSBERG: Excuse me, I'll object for two reasons.

First of all, I think he should say which, if any, and I think they are different items. Cooking is one thing and repairs another thing.

Q. Which individual, if any, is primarily concerned with cooking?

A. Either my wife and my daughter.

Q. And the cleaning of the house such as dusting and vacuuming?

A. The same.

Q. What about making the beds?

MR. GINSBERG: We'll have to assume the beds are made.

A. Primarily my wife would take care of it but the girls usually help and my sons usually help make their own beds.

Q. What about the household laundry?

A. My wife and my daughter usually take care of that.

Q. It is fair to say then that while your son John was alive he enjoyed those services provided by your wife and your daughters?

A. Yes, he did.

Q. I believe you testified that the major work around the house was done by yourself, is that correct?

A. Yes, most of it.

Q. Mr. Luger, did your son John buy his own clothing or was that purchased as part of the household expenses?

A. I would say he bought most of his own clothing. My wife went out from time to time and would pick him up, you know, like a suit jacket or dungarees, which he wore most of the time and sometimes if he needed something he would tell my wife to go out and buy it and then pay her back for it.

Q. Mr. Luger, with respect to the pension to which you would be entitled if you continued in your present employment for twenty years, are you aware of what the pension benefits are?

A. No, I'm not. I understand they're pretty good but I have never really looked into what they actually are.

Q. Do you contribute to that pension plan or is it just your employer?

A. No, presently I am not. The employer pays for it all.

Q. In addition to the pension plan, do you also contribute to Social Security?

A. Yes, I do.

MR. SCHAFFER: I have no further questions. Thank you very much.

REDIRECT EXAMINATION

BY MR. GINSBERG:

Q. Mr. Luger, first of all, sir, concerning the clothing, whether your wife physically bought the clothing or whether John physically went to the store and bought it, who would pay for the clothing?

A. In some cases my wife would buy it for him. Other times he would pay for it.

Q. I don't know how much clothing he wore a year but could you break that down for us? I am not talking about when he was a teenager.

A. When he was working. I guess about $150 a year, two, three dungarees, suit, jacket. That's what we would pay for.

Q. Mr. Luger, you were asked about anticipation if your son John had continued to live with you,and you had continued to work and your wife had continued to be a housewife and everybody's health continued on as it had been, in good condition.

Would you have expected John to continue to contribute approximately the same percentage of his income as his income went out as he was contributing at the time he passed away?

A. Providing none of the conditions changed.

Q. That's what I'm asking.

In other words, if you kept your job, your wife kept being a housewife, John kept his job, would you have expected him to contribute about the same -- and all your health remained good -- would you have expected him to pay approximately the same percentage as he had been?

A. Yes.

MR. SCHAFFER: Excuse me, that question is based on the assumption that John was living at home, is that correct?

MR. GINSBERG: Yes.

Q. If somebody had gotten sick, either yourself or your wife and additional expenses were needed for the household, would you have expected John to help out even if he was married and living in his own home, unless obviously he had ten children of his own and couldn't afford it?

A. Yes, I would.

Q. If he married a very rich woman, would you have expected even more money?

MR. SCHAFFER: Objection.

THE COURT: Yes, I think we are getting across the speculative dividing line.

MR. GINSBERG: I withdraw that.

Q. Mr. Luger, if the normal way of the world happens as I guess we all know, women statistically outlive us by about seven or eight years, and your wife were in her old age and you were no longer around to take care of her, would you have expected that John, as the oldest son, would have either taken her into his household or provided some means of shelter and food for her for the remaining years of her life?

MR. SCHAFFER: Objection. I think that also crosses the line.

There are some facts that are concluded in that assumption which are subject to proof such as life expectancies and they're not yet in evidence. Also some facts which perhaps have been admitted, such matters as life insurance, health insurance, the matter of six other children. The variables become so multiplied that we are again across the line.

THE COURT: Why don't we restrict that question to the relationship between young John and his mother. Then I can draw a conclusion from that.

How was the relationship between him and his family?

THE WITNESS: It was very good. We didn't have any more than the regular rouse than you have in the family but outside of that, no. If I needed any extra money, I shouldn't say, but I guess I did run short sometimes and there would be no problem with any of my children.

THE COURT: How did your son get along with his mother?

THE WITNESS: Fine.

MR. GINSBERG: That's all I have.

THE COURT: Thank you very much.

(Witness excused.)

MR. GINSBERG: Your Honor, I have one motion to make, if I might.

I had relied and it was my error that the savings account had come as a result of the insurance money received. That was brought out on cross examination by my adversary. I would, therefore, move at this time to exclude and to strike from the record any reference to that savings account and any reference to the income which is currently received by Mr. Luger from that savings account on the ground that it would not have existed, obviously, has his son not passed away.

MR. SCHAFFER: Your Honor, if I may respond to that.

Obviously under the collateral source rule, the recovery in this case may not be reduced by any insurance recovery. However, the existence of that savings account and interest earning on it is, I believe, relevant to show the financial security of the family.

THE COURT: It seems to me that that latter point is --

MR. GINSBERG: If I may be heard, your Honor.

I agree with the first part of what my friend says about the collateral source rule.

THE COURT: I do, too, but it seems to me the latter part is so.

MR. GINSBERG: If I may, your Honor, while I know in a way it's sort of silly, I believe what a Court is required to do is to determine damages as of the moment of death. What the collateral source rule says is that in determining these damages, the Court or jury is not permitted to take into account, in this case, any insurance monies that were received from the family.

To say one is not taking it into account and at the same time say we are going to take the interest and the existence of the savings account into account, when the savings account and the income therefrom are the results of the collateral source fund received upon the death of the decedent, is to indirectly circumvent this rule.

THE COURT: What was it, a $20,000 policy through the employer?

MR. GINSBERG: I didn't ascertain that.

THE COURT: Mr. Luger, was it a $20,000

policy?

MR. LUGER: It was a Con Ed policy and I think because of the accidental death, they gave us a settlement of $30,000.

MR. GINSBERG: I gather some went to pay the funeral expenses and so on.

THE COURT: I am going to reserve decision on that motion.

MR. GINSBERG: At this point if the Court pleases, I will introduce into evidence the death certificate and the autopsy report.

THE COURT: No objection?

MR. SCHAFFER: No objection.

THE COURT: Received.

xxx (Plaintiff's Exhibits 8 and 9 received in evidence.)

MR. GINSBERG: Mrs. Luger, please.

GERTRUDE LUGER,

called as a witness by the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GINSBERG:

Q. Mrs. Luger, if you talk up nice and loud so that I can hear you, then the Judge will be able to hear you, too.

Mrs. Luger, are you the mother of the late John Luger?

A. Yes, I am.

Q. Mrs. Luger, I know you heard your husband testify, so I will try to perhaps save a couple of minutes.

Are you a housewife?

A. Yes.

Q. I gather you do the cooking in the family.

A. Yes.

Q. With perhaps some assistance from your daughters.

Do you buy the food yourself or do you at least supervise the buying of the food?

A. Yes.

Q. Could you tell us approximately how much money you spend a week on food for the entire family, first at the present time and then about how much you were spending at the time that John met with his accident?

A. I think it was approximately the same, pretty close the same.

Q. And your husband said something about $125, is that about right?

A. Right.

Q. Mrs. Luger, there was testimony from your husband that while the rest of the children and you ate all your meals at home, John would miss a meal because of his work, is that correct?

A. Right.

Q. Can you remember approximately how much money you saved on the food budget immediately after John passed away? In other words, the week before he died, how much more it cost you than the week or two after he died.

A. I don't know.

Q. I know there is an old saying, two can live as cheaply as one.

Can seven live as cheaply as six or --

MR. SCHAFFER: Objection.

MR. GINSBERG: Withdrawn.

Q. Was there any real savings on the food budget after John passed away?

MR. SCHAFFER: Objection as to form.

THE COURT: Yes.

Mrs. Luger, do you have any real sense or idea how much it cost for each of your youngsters two years ago, a week?

THE WITNESS: At least $100.

THE COURT: Would you divide that?

MR. GINSBERG: I hate to object to your Honor's question but I would like to because I think it's leading and I don't think it's accurate because I think there is some savings when you're buying for ten people and one is missing. I don't think you save 10 per cent because there are items you buy collectively which are cheaper. The witness may not know the answer.

MR. SCHAFFER: Your Honor, if I may note, the question was asked of Mrs. Luger, did she recall the difference in family expenses immediately before and after the death of her son John. I don't know whether the court reporter caught the answer because it was more of a gesture but Mrs. Luger I believe clearly indicated she couldn't say.

That question having been asked and answered, I submit there is nothing more that can be said on the subject.

THE COURT: That's your understanding? You couldn't say what the difference was before and after?

THE WITNESS: There is not too much of a difference, no.

THE COURT: Go ahead.

Q Mrs. Luger, do you, yourself, drive an automobile?

A. No.

Q. Is an automobile used in shopping for the family food?

A. My husband took me all the time and if he wasn't available, my son John took me.

Q. My first question maybe was a bad question.

Those of us who live in Manhattan, we just walk to the grocery but out where you live, do you have to take a car in order to buy your food?

A. Right.

Q. So that unless you had a car, you couldn't do your shopping, is that correct?

A. Yes.

Q. Mrs. Luger, about how often a week during, let's say, the last year that John was alive, about how many times a week would he drive you to do the shopping?

A. Well, I made one shopping weekly, one normal shopping a week and then whatever we need in-between. The family always needs something. A couple of time, I would say, two or three times.

Q. Mrs. Luger, is there anything else you can think of, any other assistance of any kind that your son John gave you around the house?

A. He helped me when I needed him, you know, for something. He was always available, helpful that way.

Q. I think your husband was asked did you have a good relationship with your son?

A. Yes, I did.

MR. GINSBERG: That's all I have. Thank you.

MR. SCHAFFER: I have no questions, your Honor.

THE COURT: Thank you very much, Mrs. Luger.

(Witness excused.)

MR. GINSBERG: At this time, your Honor, I would offer into evidence the letters of administration granted to Carol Lavender by the surrogate of Queens County.

MR. SCHAFFER: No objection.

THE COURT: Received.

xxx (Plaintiff's Exhibit 10 received in evidence.)

MR. GINSBERG: Your Honor, I would next like to offer into evidence the St. Claire's Hospital record, which I believe your Honor has.

MR. SCHAFFER: Your Honor, with respect to the hospital record, I certainly have no objection as to the authenticity. I don't think I have an objection on other grounds but I just want the record to reflect that

I believe these are being offered not merely as the authentic hospital record, but as to the truth of progress reports and nursing notes contained therein. Is that the purpose?

MR. GINSBERG: I suppose so, yes.

MR. SCHAFFER: I have no objection.

xxx (Plaintiff's Exhibit 11 received in evidence.)

MR. GINSBERG: In that light, your Honor, I know that the Court, of course, will read the record. There are just one or two entries I would like to cal the Court's attention to.

On the page entitled "Physical Examination," which is about the sixth page, in my copy of the record, if I may approach, just to show your Honor what it looks like, the page, just to note the top entry where it says: "W.D." which is well-developed, and "W.N." well-nourished, "conscious, alert, pale and severe --" and I believe the next word is "acute," that has been put in, "distress."

Then a note on the progress record about four pages later, at six something, I can't make that out, where it again notes he is conscious and alert and looks pale, and then further on in the progress record, about three or four pages thereafter where it simply says he could not quite describe what happened but only knew he was surrounded by other people after the accident.

I call those entries to the Court's attention obviously on the issue of consciousness to the pain and suffering he was undergoing. There are other entries, too, but I thought I would call those to the Court's attention.

I would next offer into evidence --

MR. SCHAFFER: Your Honor, if I may, since counsel for plaintiff has called several entries to the Court's attention, counsel for defendant would like to point out two such entries also with the Court's permission.

I would first note there may be some problem here with this progress record. I'm not sure that it is in time sequence order.

I do note on the very first page, about the middle of the page, there is an entry for anesthesia pre op. and there is no time indication at that point but it quite clearly refers to the anesthesia given to him before the operation.

Then, approximately three pages later, on the progress record, it's a separate entry about two-thirds of the way down the page, it says "Surgical attending note, notified 7:05 a.m., advised" and at this point I have trouble reading it, "-- arranged laparotomy" and I believe that indicates the time frame for the anesthesia and for the operation sometime roughly between 7:00 and 8:00 o'clock in the morning of October 31.

THE COURT: All right.

MR. GINSBERG: Next, your Honor, I would offer into evidence the autopsy of Mr. Lavender.

MR. SCHAFFER: No objection.

xxx (Plaintiff's Exhibit 12 received in evidence.)

MR. GINSBERG: One thing that I should point out, your Honor. In the hospital record that your Honor has, there is a certified copy of the bill.

I just wonder, your Honor, if I might have that marked perhaps as 11-A, to separate it.

THE COURT: I don't see it.

MR. GINSBERG: I apologize, your Honor, it was in the hospital record.

THE COURT: I see it. All right.

xxx (Plaintiff's Exhibit 11-A received in evidence.)

MR. SCHAFFER: If the Court please, since counsel for defendant does not have a copy of that bill, could your Honor read off the total sum on that hospital bill?

THE COURT: Sure. It's $1768.30

MR. SCHAFFER: Thank you very much, your Honor.

MR. GINSBERG: Next, your Honor, I will offer into evidence a copy of the death certificate.

xxx (Plaintiff's Exhibit 13 received in evidence.)

MR. GINSBERG: Your Honor, my next witness is going to be Mrs. Lavender and I know that I can't finish her --

THE COURT: Why don't we recess until five minutes after two.

(At 12:55 p.m., a luncheon recess was taken.)

AFTERNOON SESSION

2:15 p.m.

MR. GINSBERG: Your Honor, right before the recess I discovered a better copy of the death certificate which I put in on the end. If I may substitute it, I think it will be easier for the Court to read.

Mr. Caulfield, please.

THOMAS CAULFIELD,

called as a witness by the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GINSBERG:

Q. Mr. Caulfield, tell us your occupation, sir.

A. I'm a business agent for the Utility Workers Union of America, Local 1-2.

Q. Mr. Caulfield, can you tell us just in general terms what type of workers the Utility Workers of America represents?

A. We represent all types of workers; carpenters, clerical workers, suppliers, linemen, apparatus people.

Q. Do you represent people who work for various utility companies throughout the country?

A. We are affiliated with them.

Q. Does your union have a connection with employees of the Consolidated Edison Company?

A. Yes.

Q. Are you the bargaining agent for those employees?

A. Yes.

Q. Mr. Caulfield, to your knowledge, is there a requirement of any sort that a person employed at Con Edison join your union?

A. Yes. They must join the union within three months.

Q. Mr. Caulfield, at my request, have you brought with you the collective bargaining agreements between your union and the Consolidated Edison Company for five or six or seven years up to the present time?

A. Yes, I have.

Q. Will you take them out, sir.

Will you tell us from what years those booklets representing the contracts go to, from when to when?

A. From 1968 through 1977.

Q. Mr. Caulfield, would every employee, and in particular every mechanic who is working in Con Ed and who has been on the job for a period of more than ninety days, be governed by the provisions of those collective bargaining agreements?

A. Yes.

MR. GINSBERG: I will offer them in evidence, if the Court please.

MR. SCHAFFER: I would like to have these collective bargaining agreements identified, the parties to them.

THE COURT: I think that appears on the face of the books.

Q. Between whom is that collective bargaining agreement?

A. Between Consolidated Edison Company of New York Incorporated and the Utility Workers Union of America, AFL-CIO and its local union Number 1-2.

MR. SCHAFFER: May I see them before the offer?

THE COURT: Absolutely.

(Documents handed to Mr. Schaffer.)

MR. SCHAFFER: No objection.

xxx (Plaintiff's Exhibits 14, 15, 16 and 17 received in evidence.)

MR. SCHAFFER: Excuse me, for the record, can we identify which collective bargaining exhibits bear which exhibit number?

THE COURT: I don't think you need to do that. They're on the face.

BY MR. GINSBERG:

Q. Mr. Caulfield, I will just ask you a few questions, sir.

I know the documents are in evidence but for interpretation purposes of the most current of the agreements, first of all, does that agreement provide any job security for the employees of Con Edison, and I am referring to mechanics, not referring to the president of the company or someone like that?

A. Yes, there is a ten-year job security clause in the contract.

THE COURT: What does that mean?

THE WITNESS: It means after ten years your job is secure. Before ten years, of course, they can take it out.

Q. Without asking you the specifics, Mr. Caulfield, does the latest agreement -- could you take the latest agreement and tell us what number it is?

A. As far as the exhibit?

Q. Yes.

A. Number 14.

Q. Does that exhibit provide -- on the face of it it goes through June of 1977 -- does that provide for certain advances in salary, even up until its expiration in June?

A. Yes. There is a clause in there for promotional programs. Would you want me to --

Q. Why don't you explain that a little bit?

A. When a man is hired in the company as a field man, he is hired as a general utility mechanic. He then can proceed as a B Mechanic. Then to a B and EOH. Each title is higher. Then into an A category, into a splicer's title, into a lead mechanics title and from there into supervision.

Q. As he goes up the scale, so to speak, are there salary increases that go along with it?

A. Yes. From title to title, there are what we call progression increases. Progression increases are $6, three times a year until he hits the maximum and goes into the next category of a title.

Q. Let me go slowly if I may for just a second. Remind me again, what was the category before A Mechanic, the one lower down?

A. EOH equipment operator heavy.

Q. Let's assume somebody reaches the top rung of EOH and then gets promoted to Mechanic A, does that promotion itself bring any salary increase?

A. Yes, it does.

Q. If he remains as Mechanic A for six years or five years or whatever number of years, are there increases-- I am not talking about the general collective bargaining increases but increases the person gets by reason of his being in that title for a certain length of time?

A. Yes, he would get -- if he became an A Mechanic, and the next title is a splicer, if he was going into splicing, he would get the progression until he reaches the splicer's title.

Q. The progression was $6 three times a year?

A. Right.

Q. That's $6 a week?

A. Yes.

Q. If I became an A Mechanic I keep getting $6 three times a year and let's say I was an A Mechanic for four years, I would get it for four years?

A. Until you reach the top of an A Mechanic which could be four years.

Q. Is there a particular number for an A Mechanic, if you --

A. There is no time limit. You can pick it up in two years, three years, four years.

Q. Let's say I have now reached the top of A Mechanic, the next step is, I think you said, splicer?

A. Splicer.

Q. If I get promoted from A Mechanic to splicer, will I get an increase in salary just because of that promotion?

A. Yes, your premium time until you get to the top of the splicer.

Q. I start from the bottom then and I get the $6?

A. You start from the maximum of your A, and then you would pick up your progression until you hit the next top of the title, splicer.

Q. Do I understand correctly from what you say that the highest category of splicer makes more money than the highest category of A Mechanic?

A. Right.

Q. And similarly --

A. And then lead mechanic, right.

Q. Do you, yourself, you may not, but if you do know, do you have any idea based on your experience as a business agent as to assuming somebody is a good worker and has worked his way up in a few years, as Mr. Lavender had, to A Mechanic, what the likelihood is of his going up the ladder as you have described it?

A. Yes. As you went up the ladder and you had an A, your ability -- it's in the contract also, your qualification is your agent for the promotion to the next step, which the man could have got into that category, going higher.

Q. Do you have any idea statistically how many people -- Mr. Lavender was only in the company a few years -- as to how many people who have become A Mechanics in a few years, how many then go on to the next step, if you know?

A. No, but they do go on. I couldn't give you the number.

Q. I didn't know if that was your area.

Now, is there a page in your booklet where all these salaries, or pages in your booklet where all these salaries can be found in case his Honor later on looks through the book? Can you tell me the pages?

A. The pages are in the back. It's the job pay rates.

Q. Is that the one that says, "Statement of Job Titles, Part 5"?

A. Right. And you would more or less stick to the X schedule part of it. They're the field forces. The inside forces and the outside forces, there are two parts.

Q. Some Con Edison employees do desk jobs and others are out in the field?

A. Right.

Q. The X are out in the field?

A. Right. It states X Schedule on the top of each page. It would start on Page 81.

Q. In addition to, I think you called them progression increases, meaning going up from one title to another or getting more senior in your own title, were there also progressive increases that everybody was getting? In other words, the top A Mechanic, was he making more monthly in 1976 than he had been in 1974 pursuant to terms of this contract?

A. Yes. As far as the general wage increase.

Q. Could you explain that to us just a little bit?

A. A general wage increase, at the expiration of every contract, we go in for a general wage increase. Of course that's negotiable and what we can pick up as far as an overall general increase for all the employees at the end of the contract or the beginning of the new one.

Q. Would you remind me again how many years you have been negotiating and were involved in these contracts?

A. I've been around with the Utility Workers since 1961.

Q. Would it be a fair statement that every contract you have negotiated up to the present time with Con Ed has involved a fairly considerable increase?

MR. SCHAFFER: Objection.

THE COURT: Yes, sustained.

Q. Mr. Caulfield, in addition to base salary, are any provisions made for overtime?

A. Yes, there is.

Q. Again, just in a general way can you tell us what provisions are made for overtime?

A. Well, overtime would be paid at time and a half for each hour worked over the forty hours. We try to do it on the basis of equalization of the overtime. Of course if we can't equalize it, people take a little more than another man, which it is actually too hard to equalize the whole program.

Q. If somebody works a different shift, other than the day shift, is there any provision in the contract which covers any additional pay for that?

A. Yes. If you worked the 4:00 to 12:00 shift, there is a 6 per cent premium time. If you worked the midnight shift, which is 12:00 to 8:00, it's an 8 per cent premium time. If you worked Sundays, it's a 50 per cent premium time.

Q. Mr. Caulfield, in additon to salaries, when you negotiate a collective bargaining agreement, are there things, I guess we call them fringe benefits, that are negotiated as well as the base salary?

A. Yes.

Q. Do those fringe benefits include things like a pension, medical coverage and --

MR. SCHAFFER: Objection.

Could we just have the witness answer what they include?

THE COURT: Yes, sustained.

Q. What do they include?

A. The benefits include a sick plan which is HIP, also GHI; a dental plan. Now, this is not for the -- do you want me go go by members of the family?

Q. If members of the family get benefits, I would like you to mention it.

A. All right. They also have Blue Cross. They have what you call a medical plan which is our own in the Edison Company. The member pays half and the company pays half of his medical bills which he is protected for all bills and time off and such, which is payment; we negotiate also the pension plan as a benefit.

Q. Those are the major ones?

A. Yes. We also have a major medical plan also.

Q. Mr. Caulfield, when these negotiations are carried on, is there a dollar or percentage figure put on the fringe benefits? In other words, does somebody, your actuaries or whoever, say the fringe benefits are 3 per cent, 20 per cent or 50 per cent or whatever per cent of the base salary?

A. Yes, they figure out --

MR. SCHAFFER: Objection.

I believe that the percentage which the union's actuaries attribute to fringe benefits has no relevance at all to their value in this case to the surviving spouse.

THE COURT: Yes. It doesn't seem to me that really helps any.

MR. GINSBERG: I would suggest it does unless we are going to spend a long time on each individual benefit. I think they actually negotiate it in terms of a certain percentage over the base salary and since these benefits are lost to his family --

THE COURT: The benefits are in part to him as well and until we get down to what part his family gets, it doesn't seem to me you have a meaningful figure.

MR. GINSBERG: I was going to get at least to the major part, the medical and pension.

THE COURT: Why don't you go to those then and deal with those.

Q. Mr. Caulfield, would it be a fair statement that between all of the medical and dental plans, plus the pension plan, we are talking about the large bulk of the fringe benefits that I spoke of earlier?

A. In other words, what percentage you feel that it might be if it was benefits?

Q. Let me perhaps do it this way.

There are a number of fringe benefits, am I correct?

A. Yes.

Q. My question is: Are the various medical plans -- and the pension plan, when you add those two together, does that make up 90 or 95 per cent of the fringe benefits?

MR. SCHAFFER: Objection, your Honor.

I think we ought to define what we mean by major part. In terms of cost or benefits provided? You can measure something as major and minor from a number of points of view. I would like to have a clarification.

MR. GINSBERG: I was giving him percentages.

MR. SCHAFFER: Of what, of cost to the employer, of benefits to the employee? There are a number of ways you can measure this.

THE COURT: I'm a little concerned that it really doesn't relate to what I must consider.

MR. GINSBERG: At this point my question was whether the medical and pension plan between them made up 90 or 95 per cent of the total of fringe benefits. I was not yet at the question I was going to come to perhaps.

THE COURT: His answer --

A. No.

Q. What percentage would you say --

A. Well, we figure it out to be about 26 per cent.

Q. Maybe my question is bad.

I think you mean 26 per cent of the base salary.

A. In other words, when you get the salary, it's all spelled out what you're going to get, what percentage. They also put a part on to the fringe benefits. In other words, what the percentage of the benefits are, the package deal and it would come to about 26 per cent.

Q. I think that's the question the Judge didn't want you to answer.

A. I'm sorry.

THE COURT: We will take that as a starting point for something else.

Q. I think what you're saying and stop me if I'm wrong, is that let's say somebody is making $1 an hour in straight salary. Whoever your actuaries are that work for the union and Con Ed, when they have added up the fringe benefits, they figure beside the dollar the employee is making another 26 cents in these fringe benefits?

A. Right.

Q. My next question is this: Of that 26 cents, would it be fair to say that almost all of the --

THE COURT: Let's ask him. How many cents of that 26 cents is medical, dental and pension?

THE WITNESS: I don't get you now.

THE COURT: You have certain fringe benefits -- that are not medical, dental and pension, right?

THE WITNESS: Right.

THE COURT: What percentage is the medical and dental and pension?

THE WITNESS: On an overall basis of the fringes, I would say it's somewhere around 26 per cent. In other words, you have a package that you come out with in wages such as wages, and they tell you all right, we got maybe 10 per cent, 7 per cent, whatever it may be on the wages. So we would come out with 26 per cent on the medical and pension or combined.

In other words, let me put it this way, Judge, if you don't mind.

THE COURT: No, go ahead.

THE WITNESS: In other words, right at the present moment we are figuring what we have now as far as benefits would be somewhere around $50 a week on benefits on our present contract.

THE COURT: Some part of that is the sick plan?

THE WITNESS: Yes, dental and all different plans. You have a dental, medical major medical, vacations, premium.

Q. Mr. Caulfield, this may not be an area that you are familiar with.

Do you know, and if you don't, please don't answer the question, do you know what happens to an employee's family who is on all of these medical and dental plans and the pension plan, what happens to such an employee's family if the employee dies and is no longer with Con Edison?

A. Well, of course, our pension plan is actually 75 points which if the man had 75, for example, of twenty-five years in the company --

Q. Let me stop you. We are talking about a man who is only twenty-seven years old.

A. That's what I'm trying to say. In other words, if you don't have those plans, there is actually nothing there as far as the pension and all the medical stops. I think you have one-month grace and that's about it.

MR. GINSBERG: Thank you very much, sir.

CROSS EXAMINATION

BY MR. SCHAFFER:

Q. Mr. Caulfield, you spoke about salary increases which came about as the result of promotions in the position or grade level of an employee. I think you gave the example of an A Mechanic becoming a splicer.

Are those promotions automatic with the passage of time or do they depend upon employer discretion?

A. Well, actually it isn't automatic but we have a promotional program built into our contract each year, so we negotiate the promotional program.

Q. Can you explain in a little more detail what you mean by promotional program? Is that a training program?

A. No. In other words, if you start off as a general utility mechanic, the next step would be B, and that automatically goes into B. Now you take that into a splicer and that one would be a promotional program. The B into the EOH equipment operator, a driver, the B then can go into the driver's category as time goes on. The EOH, the B can go into that the same way. They're more or less automatically going into it.

Q. I understand the progression is a fixed progression but what I'm asking you is, after you have been, let us say, an A Mechanic for a specified period of time, there is no guarantee you're going to be made a splicer at the end of that period of time, is there?

A. At the end of the A period of time?

Q. Is there a period of time?

A. There could be a period of time, yes.

Q. What do you mean there could be?

A. In other words, we have been promoting splicers every year because of the contract. In other words, it is a promotional program. Actually we would go in and negotiate with the company how many promotions we need and they would go into the next category of splicer.

Q. Once you determine how many promotions are needed, on what basis are people promoted?

A. On their attendance, attitude, qualifications. That's also in the contract.

Q. You also spoke of general wage increases which are negotiated at the commencement of each new contract, is that correct?

A. Right.

Q. During the period involved in the collective bargaining agreements you have brought with you today from 1968 to the present, isn't it a fact, Mr. Caulfield, that the increases for Con Ed workers were somewhat higher than they had been before in order to catch up to the level of other utility workers around the state?

A. Well, the last three contracts were very good contracts, yes.

Q. The reason they were higher than before was, in fact, to catch up to the workers of Long Island Electric Company and Hudson Mohawk Electric Company; isn't that why they were higher than before?

A. No.

Q. Isn't it a fact that during the mid-sixties the Con Ed workers were generally regarded as having a somewhat lower scale and there was an effort to catch them up to the rest of the workers around the state?

A. If you say maybe going around sixty that could be so but right now its productivity, more skilled workers because of the primary and secondary we have to work on in the city.

Q. Between 1960 and the present, at least part of the general wage increases were the result of an attempt to catch up Con Ed workers to other workers around the state, is that a fact?

MR. GINSBERG: Objection.

I think he has to break down in to which years he is talking about. We already had that same question a couple of minutes ago without objection.

Go ahead.

Q Mr. Caulfield, you said a moment ago that if we start from 1960, that there was a period sometime subsequent to 1960 in which Con Ed workers were catching up to the example I gave, is that correct?

A. You're not naming the right company. We wanted to go over the Telephone Company, before 1960, that's right, that's one of them.

Q After 1960, wasn't there a catching up --

A. The last three contracts we had gone through, I think we were up and above any utility around the country but we felt the work we do, most hazardous work here in the City of New York with our underground primary as such, we had to go further.

Q The only point I'm trying to ask you about, Mr. Caulfield, is that to some degree, if you look at, say, the last seventeen years, to some degree the general wage increases that have been negotiated on behalf of Con Ed workers, were the result of an attempt to catch up to other utility workers, is that correct?

A. Going back in years, yes. Going back in years.

Q. Is it also correct that to a certain degree the general wage increases that are negotiated with each collective bargaining agreement are intended to counteract the effects of inflation so that the real wage being earned by the employee remains at the very least constant? Is that a correct statement?

A. I would assume so.

Q. On direct examination, you spoke about a number of fringe benefits that are part of the collective bargaining agreement. Some of these fringe benefits, I think you mentioned, are of benefit to the employee's family as well as the employee himself; is that correct?

A. Yes.

Q. And among those, would it be fair to say, are the health benefits and the pension benefits?

A. Right.

Q. Other benefits would not be of benefit to the family in a situation such as this one where the employee is deceased, isn't that true?

Let me give you a specific example. Life insurance, for example, is one of the fringe benefits.

A. Right.

Q. Now, a situation where unfortunately there is no longer that life to insure, that would not involve a loss to the family of the employee, would it; that is, to no longer have that life insurance coverage?

A. No, it wouldn't.

Q. Similarly the provisions for sick pay, holidays, vacations, these also would be fringe benefits which, although cut off after the death of the employee, don't really involve a loss to the employees' families, do they?

A. No. I have no idea.

Q. So that from a point of view of the employee's family, the only fringe benefits that are lost to them as a result of the employee's death are pension and medical, is that correct?

A. Right.

Q. Let me return to the question that I believe his Honor was trying to ask you before.

When you take this whole package of fringe benefits with the medical, the pension, the life insurance, the sick days, the holidays, you have all of these elements together.

Of that whole package, what percentage of value would you place on the medical and pension aspect of the fringe benefits? Do you understand the question?

A. I can understand your question. As the overall I could probably answer it. I have to break it down to find out. I'm not sure.

Q. If you're not sure, there is no way you can answer that then.

A. Right.

Q. You also stated on direct examination that from the union's point of view, you estimated that the fringe benefits as a total package were worth 26 per cent of the base salary. That was the question --

A. Right, around 26 per cent.

Q. From the union's point of view, what is that figure used for? How do you arrive at it?

A. Well, our people in the union, between them and management, arrive at the end of the package or the negotiations, and this is what they arrive at as the figure.

Q. Do you know how they arrive at it?

A. The actuaries, I assume, are the people that arrive at it.

Q. But you don't know for a fact how they arrive at it?

A. No.

Q. You don't know whether it reflects cost, benefits or indeed an arbitrary figure --

A. No, I understand it's the benefits.

Q. But you are personally not involved in the fixing of that figure?

A. No.

Q. And the figure itself is known to you only because others have told it to you?

A. Because that is what we hire the actuaries for to do our work.

Q. You were told by others that's the figures the actuaries place on it?

A. What the actuaries tell us.

MR. SCHAFFER: Your Honor, at this time I would move to strike that testimony.

THE COURT: I will reserve decision. It has to do with the whole 26 per cent?

MR. SCHAFFER: That's correct. The figure at this point is somewhat meaningless. We don't know how it's figured and what it represents and in any event the number comes into the knowledge of this individual on the basis of hearsay.

MR. GINSBERG: I thought of one further question, your Honor.

THE COURT: All right.

REDIRECT EXAMINATION

BY MR. GINSBERG:

Q. Mr. Caulfield, the pension plan that you have negotiated, it has a fairly complicated formula, as I understand it, is that right?

A. Right.

Q. Do you know based on your own knowledge just as a general basis what the average employee would end up with after he retired at sixty-five as far as his salary is concerned?

A. Well, I would say somewhere around 50 per cent.

Q. Does that include Social Security or Social Security in addition to that?

A. Social Security is in addition.

MR. GINSBERG: Thank you very much, sir.

MR. SCHAFFER: Your Honor, before the witness is excused, may I have a moment to look through the collective bargaining agreements?

THE COURT: Yes.

(Handed.)

RECROSS EXAMINATION

BY MR. SCHAFFER:

Q. Mr. Caulfield, the provisions covering eligibility for pension benefits, are they contained in the collective bargaining or somewhere else?

A. They're contained in another booklet.

Q. And the actual computation of what those benefits are, as how much you will receive depending on what you retire, they're not contained in the collective bargaining agreement either?

A. Not the scale.

Q. The estimate that you gave before, that an individual retiring at the age of sixty-five would get in the vicinity of 50 per cent of his previous salary, that is based upon your recollection from these other booklets?

A. Yes. I would say --

Q. Just answer the question.

Is that what it is based on?

A. Right.

MR. SCHAFFER: Your Honor, at this point I would move to strike the testimony. The best evidence of what the terms of the pension programs are are contained in the booklets and if plaintiffs wish to rely on the possibility of pension benefits, I believe they have an obligation to introduce those into evidence.

THE COURT: Mr. Ginsberg, what say you to that?

MR. GINSBERG: I think my next witness will do that, but I think this witness with all his experience in the field can take an area which has complex formulas, they have a magic number of seventy-five as I understand it, add up the number of years plus your age and another percentage and it comes out to a certain thing, and that is certainly accurate and the subject of cross examination, but I don't think it precluded this witness with his expertise in the field from giving his opinion that the average employee will make about 50 per cent of his salary for the Court to consider.

THE COURT: You say you will have another witness who is going to put this in an authoritative manner?

MR. GINSBERG: I have another witness who either has or I can give to him an actual pension plan so I can put them into evidence if counsel wishes. The other witness is employed by Con Ed.

THE COURT: I will strike out that answer then. I will say that the motion to strike the 26 per cent figure, I am troubled on this because before the witness leaves the stand, I want you to be aware I am troubled by the fact, because I don't know how much of the 26 per cent I may legitimately consider, whether half of it, a third or two-thirds. Obviously it's a substantial amount but I'm only guessing at this point.

MR. GINSBERG: I understand the problem and did attempt to ask a few questions to help and the witness' last answer was he really hasn't broken down between pension vacation and holiday and medical as to what part it is of the 26 cents.

THE COURT: All right, I will continue to consider it.

Do you wish to examine further? Are you through with the witness?

MR. SCHAFFER: Yes, your Honor. The collective bargaining agreements are in evidence and they speak for themselves. I suspect that expert witnesses for both parties will be relying on them to some degree for their expert testimony and there is really nothing else of this witness.

THE COURT: Thank you very much, you are excused.

(Witness excused.)

MR. GINSBERG: Mr. Lind, please.

JOHN LIND,

called as a witness by the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GINSBERG:

Q. Mr. Lind, by whom are you employed, sir?

A. Con Edison.

Q. How long have you been so employed?

A. I started in August of 1964.

Q. Mr. Lind, to start, sir, was there a subpoena served upon the Consolidated Edison Company to produce here in court the earnings for both Mr. Luger and Mr. Lavender for the years 1973 and 1974?

A. Yes, there was.

Q. Have you obtained from your payroll or actuarial or whatever department of Con Ed those figures?

A. Yes, I have.

Q. Have they been broken down into base pay and overtime?

A. Yes, they have.

Q. Do you have the figures with you?

A. Yes, I do.

Q. Could you tell us first for Mr. Lavender what the base pay was for those two years?

A. Well, in 1973, Mr. Lavender received $9,190.40 in base pay. In addition to his base pay, there were monies paid to him involving overtime and premium time for his night work: $2,366.80, and his total earnings for that year, for 1973, base pay, overtime and premium time were $11,557.20.

In 1974, from January up until October 31 I believe was the date of the accident here, or death, Mr. Lavender received in base pay $9,506.40, in base pay. In addition to that in overtime and premium time, there was $2,807.89 paid to him. The total amount up until October 31 was $12,314.29.

Q. Let me stop just to clarify for one moment.

Do I catch from your testimony that that would only be for the first ten months of 1974?

A. That's correct. Up until the date of death.

Q. Could you do the same thing for Mr. Luger?

A. Yes.

For Mr. Luger, 1973, his base pay for the year was $6,383.20. In addition to his base pay, overtime and premium time amounted to $2,897.81. His total figure was $9,281.01.

Q. And in 1974?

A. In 1974, for the first ten months up until

October 31, he received $6,966.20 for base pay. The overtime and premium time was $2,401.03, for a total amount of $9,367.23.

Q. I know you were in court when Mr. Caulfield was on the stand. I received from the Consolidated Edison Company three documents, one entitled, "Explanation of the Consolidated Edison Pension and Benefits Plan;" the other one, "Explanation and Summary Weekly Employee Benefits." The other one "Consolidated Edison Pension and Benefits Plan."

Let me show you these three documents and ask you in fact whether those are the documents of the Consolidated Edison Company, referring to the pension plan, the explanation for the pension plan and the other benefits.

A. Yes, they are.

MR. GINSBERG: I will offer them in evidence.

MR. SCHAFFER: Your Honor, all these documents are either dated or stated to be effective after the accidents in this case, and, therefore, I am somewhat dubious of their relevance, at least in the absence of some testimony as to how the plan may have changed or differed from the time prior to October '74, until the dates of these documents that have been handed to me.

MR. GINSBERG: I will ask him.

MR. SCHAFFER: Before introducing them, I don't want to make it unduly difficult on plaintiff's counsel, but I am concerned that these are dated after the date of the accident.

BY MR. GINSBERG:

Q Mr. Lind, the two books concerning the pension net that it is effective August 1, 1975.

Do you know whether there was a difference in the pension plan as of '74?

A. I'm pretty sure. I think there was a slight difference in the last contract that was negotiated. You have to tie this in with the collective bargaining books that you have in evidence. They just changed the pivot year in which they figure the pension. That is a change in the pension plan as to the last so many years an employee worked, as to their highest amount of money which they earned. That was negotiated, I believe, in the last contract. That would have started in 1975, I believe, the last contract.

You have the last book there which would give you any change in the pension formula. You would have to tie that in with that book.

Q The pension book that's in effect, let's assume that Mr. Lavender had not died and he had stayed with the company, would he become the beneficiary of the new pension plan or would he remain with his old pension plan?

A. He would obtain any benefits that the revisions would have offered.

Q. All these revisions for --

A. For the benefit of the plan.

Q. And the weekly employee benefits are dated September '76. My same question.

Would he have obtained any additional benefits if he had remained with the company up until then?

A. Yes. The benefits in that book are more or less the same as the date in which he died. There have been one or two changes for additional benefits negotiated in that last book.

MR. GINSBERG: With that I will introduce them in evidence.

MR. SCHAFFER: No objection.

THE COURT: They will be received.

xxx (Plaintiff's Exhibits 18, 19 and 20 received in evidence.)

Q. Mr. Lind, as I try to read the pension formulas, I couldn't understand them.

Do you have a simple explanation as to the formulas?

A. To be truthful with you, not the mechanics of the basic formula. It's a very complicated formula in which they use rate of pay, years of service, in which they figure out the formula. It's quite a complicated thing.

Q. In any event, if anyone wishes to, it is in these books?

A. Everything we have are in those books.

Q. As far as the weekly employee benefits, and this is in evidence, so I will just read a few of them. First of all there is Blue Cross, hospitalization, and am I correct that also applies to an employee's spouse and minor children?

A. That's what it's for, yes.

Q. And am I also correct that when the employee, if an employee dies and is no longer with Con Ed, his family loses that benefit?

A. Yes. They have an option to pick it up and pay for it themselves, but as far as the company goes, they don't pay for anything.

Q. Similarly the Group Health Insurance, which is GHI, the abbreviation, is that something which applies to an employee's spouse and minor children?

A. Yes, that's for the family.

Q. Do they lose that upon his death?

A. Yes.

Q. Similarly with Major Medical Expense Insurance Plan, same question.

A. It's finished.

Q. Then there is a Blue Cross prescription program, does that also apply to an employee's family and does it end upon his death?

A. Yes, it does.

Q. Then there is a Con Edison dental plan. Same question about that.

A. Yes, it's terminated upon the termination of the employee.

Q. Mr. Lind, is there a requirement for employees in the category of Mr. Lavender and Mr. Luger that prior to employment at Con Edison, they undergo a physical examination of some sort?

A. Yes. Before you're hired, you have to have a complete physical examination.

Q. Does Con Ed have a rule about only hiring people in a certain state of physical health?

A. Yes. You have to be in a good state of health.

Q. Do you know whether both Mr. Lavender and Mr. Luger passed their physical examination?

A. Yes, they both passed their physical.

Q. Mr. Lind, I had asked a couple of questions to Mr. Caulfield that maybe you would have some knowledge of but again hadn't explored them when we discussed your testimony briefly so if you don't know the answer, please don't guess at it.

Insofar as moving from category to category, I've forgotten, utility mechanic, Mechanic B, EOH, something or, sub two, and Mechanic A and splicer and so on, do you know from your personal experience how that works? In other words, if an employee is a satisfactory employee at Con Ed, is such a person going to remain forever as a Mechanic A or is such an employee going to move up the ladder of progression?

MR. SCHAFFER: Objection.

THE COURT: Let's find out first of all whether it's an automatic mandatory thing that they move forward.

I will sustain that objection.

Q. Assuming that an employee is satisfactory and is not laid off, does such an employee automatically go from one category to the next?

A. You can't really say it's automatic but it's very seldom when they hold anyone up who performs satisfactorily, as far as I know and I can see.

Q. Once you reach the stage before becoming a foreman, at that stage is it a discretionary thing that only some people make foreman?

A. That's up to the management. If they want to promote a person from the union into the management, that's strictly up to the supervision.

Q. Only if you are familiar with, again, how many steps are there from Mechanic A up to the top of the union position before you reach management?

A. I believe one more. I believe there is a splicer and that should be it, but I'm not a hundred per cent sure on that. The job classifications are all in the book, the one in evidence, the contract. Everything is in there.

Q. Do you know what percentage higher the top splicer category is from the top Mechanic's A category?

MR. SCHAFFER: Objection, your Honor.

The documents are in evidence and I believe they speak for themselves.

THE COURT: I believe they do.

MR. GINSBERG: I will withdraw that.

No further questions.

CROSS EXAMINATION

BY MR. SCHAFFER:

Q. Mr. Lind, what is your position with Con Edison?

A. I'm an investigator in the Legal Department for Con Ed.

Q. Are you a lawyer?

A. No. I'm really a trial prep man. I investigate, if a summons comes in I investigate a case, prepare an investigation, prepare the case for trial and do what is necessary to be done outside of trying the case.

Q. So then, you are not a management personnel?

A. I have a union title.

Q. Your prior testimony then on the way in which promotions occur is not based upon any direct experience as a supervisor or management personnel?

A. No. It's just from what has personally happened to me and what I see, the company's manner in which they promote people title to title.

Q. That is what happened to you and what happened to people you are familiar with?

A. That's right, yes, people who work with me in my office, who have worked with me through the years from

1964 until present. I am only telling you what I see how the company promotes.

As to exactly what they do, that's a little different.

Q. When you say what you see, is that a question of what other employees tell you?

A. No.

Q. What is your personal direct experience in that regard?

A. As far as --

Q. As far as these other people. How do you know when and how they get promotions?

A. It's usually known, announced by the union, the shop steward, when a person is promoted. Everyone knows when a title is given.

Q. Is any announcement made when someone isn't promoted?

A. No. That gets around, too, but there is no official announcement.

Q. So that you are somewhat less likely to hear about that?

A. Well, to be very truthful with you --

Q. Just yes or no.

MR. GINSBERG: Only if he can answer yes or no. I object.

THE COURT: Let me put the question.

Mr. Lind, how many of these capable crews are there in existence, do you know?

THE WITNESS: Quite a few. I can't give you a number.

THE COURT: In the hundreds?

THE WITNESS: Taking into consideration all the boroughs, at least.

THE COURT: Do you know what goes on in the cable crews in the way or promotions or absence of promotions?

THE WITNESS: No.

THE COURT: That's what you're getting at. I think I will strike out his testimony about promotion policies with regard to cable crews.

MR. SCHAFFER: Thank you, your Honor, you anticipated my motion.

I have no further questions.

MR. GINSBERG: May I explore that for a minute.

REDIRECT EXAMINATION

BY MR. GINSBERG:

Q. Mr. Lind, did I serve a subpoena on Con Ed?

A. Yes, you did.

Q. Are you the person they sent in response to the subpoena?

A. Yes.

THE COURT: We find no fault with his appearance here. It's a question as to the scope of his knowledge.

MR. GINSBERG: That's my second stage, your Honor.

Q. You mentioned that you prepare and investigate trials. I assume that those are trials concerning the Consolidated Edison Company.

A. That's correct. Cases involving -- the reason I came down with the subpoena is because --

Q. I didn't ask you that. The law office that you are with, is Williams and O'Neill?

A. That's right.

Q. Are you physically located in the same building?

A. The 18th floor, 4 Irving Place, the main headquarters of Con Ed.

Q. In the cases that you have investigated and prepared on behalf of Con Edison for trial, have you fairly frequently gone into the field and talked with and discussed things with people on these cable crews, if that's the right way to put it?

MR. SCHAFFER: Objection.

THE COURT: Given the fact he doesn't know what their promotion policies are, I don't know if he talks with some people, unless --

THE WITNESS: Judge, may I just --

MR. GINSBERG: I am trying to get a foundation laid.

THE WITNESS: May I say one thing?

THE COURT: Sure.

THE WITNESS: The promotional policies of the company, whether it be an office worker, field worker, or whatever have you is the same. The policy is defined in that book. They use the same method of promoting people for the entire company. There are no different variations. It's in the book.

THE COURT: Why don't we rest on that then.

THE WITNESS: If you read Promotion Program, it's there, defined how they're doing that.

Q Were you referring to one of these three books?

A. The collective bargaining agreement, I believe. That's the policy of the company.

MR. GINSBERG: May I read that to the witness and pose a question to him?

THE COURT: Yes.

Q Page 42 of this document, and also Number 42 states, "Preference for Promotion. In all cases of promotion of employees from one classification to another the following factors shall be considered.

"A. Length of continuous service.

"B. Knowledge, training, ability, skill and efficiency.

"C. Physical fitness and, D, attendance record.

"Where Factors B, C and D are relatively equal, the length of continuous service shall govern. If action contrary to the foregoing is taken by the management, any employee who is aggrieved thereby may represent aggrievement for adjustment for determination as determined in Article 12 of this document."

Now, number one, does the legal work you do at all involve grievances?

A. No.

Q In your experience in going through all of the aspects of the company, at least in the sense of preparing people for trials and so on, based on your own personal observation, is it true that people who are satisfactory employees, although the contract doesn't say they automatically would get promoted based on seniority, that the effect of what has occurred as far as you were able to observe, people go from one category to the next based on seniority?

MR. SCHAFFER: Objection.

I still think we have failed to qualify the witness to answer that question.

THE COURT: Sustained.

Q. Have you, in preparing cases where Con Edison is a defendant, talked with substantial numbers of the men and/or women who are employed in the cable crews?

A. Yes, I have.

Q. And in talking to these people, have you become familiar with whether or not people have remained at twenty years in one job classification on the one hand versus going up the scale on the other hand?

MR. SCHAFFER: Objection as to form.

THE COURT: Yes, that really doesn't help us in this regard. I'm sure he hasn't found anybody. The problem you are dealing with, you are dealing with a trial preparation man in a law firm that happens to be located in Con Edison's office. How are you going to qualify him as somebody who will testify to promotion practices, I don't know and he says he doesn't know what the promotion practices are in the cable crews.

MR. GINSBERG: If I may respond to that, your Honor.

THE COURT: Given that answer, I really don't feel we need spend any more time with this gentleman on this score.

MR. GINSBERG: Then I have no further questions.

MR. SCHAFFER: Nothing further, your Honor.

THE COURT: Mr. Lind, you are excused.

(Witness excused.)

THE COURT: Let's take our break now.

(Recess.)

MR. GINSBERG: Mrs. Lavender, please.

CAROL JEAN LAVENDER,

called as a witness by the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GINSBERG:

Mrs. Lavender, are you the wife of the late Ronald Lavender?

A. Yes, I am.

Q. Mrs. Lavender, could you tell us how old you are at the present time?

A. I'm twenty-nine.

Q. Was your husband Ronald the same age as you were?

A. Yes.

Q. Mrs. Lavender, can you tell us your address?

A. 6610 Grand Avenue, Maspeth.

Q. That's part of Queens?

A. Yes.

Q. For how long have you lived at that address?

A. Four years.

Q. Would that mean that part of the time you were married you lived at that address?

A. Yes.

Q. Mrs. Lavender, for how long did you know your late husband Ronald before you got married?

A. One year dating and one year engaged. Two years before we got married.

Q. Can you tell us the year of your marriage?

A. April 18, 1970.

Q. Were you married in the First Presbyterian Church in Queens?

A. Yes.

Q. I show you this document and ask you whether it is the marriage certificate between you and Ronald.

A. Yes.

MR. GINSBERG: I will offer it in evidence.

THE COURT: We can stipulate this is the fact, can't we?

MR. SCHAFFER: Yes.

Q. Mrs. Lavender, I will show you a photograph and ask whether that is a photograph of yourself and Ronald in 1970.

A. Yes.

MR. GINSBERG: I will offer that.

THE COURT: That will be received.

xxx (Plaintiff's Exhibit 21 received in evidence.)

Q. Mrs. Lavender, how much education have you had?

A. I went to the eighth grade and then two years of high school.

Q. How much education did your husband have?

A. I think about the same.

Q. Mrs. Lavender, before you were married, were you employed?

A. Yes.

Q. What type of work did you do?

A. I worked in a factory.

Q. Automobile factory, garment factory?

A. Equipment factory.

Q. Did you continue to work after you got married?

A. Yes, up until I had the baby.

Q. That was my next question.

Did there come a time when you had a child?

A. Yes.

Q. What is her name?

A. Debra Ann.

Q. When was Debra born?

A. August 30, 1972.

Q. I think you started to say after Debra was born you no longer worked.

A. Right.

Q. From the time Debra was born, was Ronald your sole means of support?

A. Yes.

Q. Do you remember when it was, approximately, that you moved to your new address, what year it was?

A. It had to be 1971. Right after we got married, we lived in one place one year and now where I'm living.

Now I'm living there.

Q. What type of residence is that, an apartment house or --

A. Apartment house.

Q. Maybe we can start with 1972, after Debra was born.

Could you give us some idea as to your activities and Ronald's activities during those last two years that he was alive?

MR. SCHAFFER: Objection as to form.

I'm afraid I don't understand the question at all, your Honor.

THE COURT: I think I will permit the question to be answered. We'll see what comes from it. I will take what is appropriate.

Go ahead.

A. Well, you mean like going out?

Q. Right.

A. We went out on Saturday nights to the movies or out to eat and we went to his mother's. She lived out in Lake Ronkonkoma.

Q. Let me start from the beginning.

The two of you lived at home with your daughter, is that right?

A. Yes.

Q. Ronald went to work for Consolidated Edison?

A. Yes.

Q. Do you remember when it was that he first started at Consolidated Edison?

A. I think it was 1969.

Q. Before you were married?

A. Yes.

Q. So that during all of the period of your marriage, he worked for Con Edison?

A. Yes.

Q. There has been testimony he worked five and a half weeks of days, seven days nights and seven days evenings, is that correct?

A. Yes.

Q. During those times when he was on the day shift, what would you do during the day. By that I mean, were you simply a housewife, did you have any other activities?

A. I was simply a housewife.

Q. Ronald would then come home at the end of his day's work and what, if anything, would he do, what, if anything, would he do after he got home?

A. He would come home, have supper and relax with me and the baby.

Q. Let's assume it's a normal Monday through Friday, five-night week.

Of those five nights when he came home after work, how many of the five nights would he stay home?

A. Every night.

Q. In-between there are weekends. On the weekend, I think you started to talk about. On the weekend I think you said you saw your mother.

A. And my mother-in-law. She lives in Lake Ronkonkoma.

Q. That is in Long Island?

A. Yes.

Q. Was there some pattern of seeing your parents, or his mother?

A. No.

Q. Would you stay for the day, overnight?

A. Over his mother, we stayed for the weekend. By my mother, we just went for the day to eat dinner on a Sunday.

Q. How close to you do your parents live?

A. Not too far. They're nearby.

Q. In other words, if you got in a car, it's about five, ten minutes?

A. About five minutes.

Q. I think you also said something about going to a movie on Saturday night.

A. Yes.

Q. Did you do anything else in the way of going out?

A. Going out to eat. That's about all.

Q. Were you friendly with any of the people who lived in the same apartment building as you?

A. Yes.

Q. Did you have any activities involved with other people in the building?

A. They would have parties, Christmastime, New Year's, birthday parties and we were always invited. Then we would have people in our house and we would go to theirs.

Q. Did Ronald have any other outside activities aside from yourself and your daughter?

A. He went fishing.

Q. How often was that?

A. About every two weeks.

Q. Who would he go with?

A. He would go with the guys from work.

Q. That would be for how long?

A. Just for the day.

Q. Aside from that, was he involved in religious groups or civic or political groups or anything like that?

A. No.

Q. Any fraternal organizations that he went to?

A. No.

Q. Was there anything that he did aside from going to work, be with his family, except for that once every other week fishing?

A. No.

Q. Mrs. Lavender, how did you handle the family finances? By that I mean, when Ronald came home with his salary check, what would be done with it.

A. He would give me so much money and he would pay the bills and then so much money I would give him to go to work.

Q. Let me go slow. He would pay certain bills?

A. Right, the rent, gas, electric.

Q. And after he paid those bills, he would have money left over?

A. Right.

Q. What would he do with that money?

A. He would buy clothes, if he wanted, or if I wanted clothes, I would buy.

Q. You said something about you would give him money.

A. I would give him $5 a day to go to work. Like we pooled the money. He gave me so much and he had so much.

THE COURT: Mrs. Lavender, did you have a checking account?

THE WITNESS: No.

THE COURT: You worked on a cash basis?

THE WITNESS: Yes.

Q. Did you know how much cash he took for himself each day?

A. Not really.

Q. You said something about $5.

A. Yes, I would give him if he needed it, I would give him $5.

Q. I am still a little confused. If your money was pooled, how could you give him the money? I would like you to explain that.

A. I would have so much money. He would give me so much and he would have so much and if he ran out, he would ask me.

Q. Aside from his own clothing and the $5 a day that he took, did he take any other money that you know of for his own personal use?

A. No.

Q. On the $5 a day, was that only on his working days or did that include Saturday and Sunday?

A. On his working day.

Q. Did that include his lunch and carfare when he was at work, the $5?

A. Yes.

Q. He worked in Manhattan, is that right?

A. Yes.

Q. How would he get from Queens to Manhattan? I mean did he take a car or public transportation?

A. He took a bus and train.

Q. Did the $5 a day include the bus and train fare both ways?

A. Right.

Q. Do you know how much his clothing would run in the course of a year? Do you have any idea?

A. Not really.

Q. Did the family own a car?

A. Yes.

Q. Did you drive as well as he?

A. No.

Q. What would happen with the car during the week? It would stay in front of the house while he was at work?

A. It would just stay there.

Q. I assume, but I will ask you, you did the normal housewifely work, the cooking and the cleaning and stuff like that?

A. Yes.

Q. Was there anything that Ronald helped you with, for instance, would you shop --

MR. SCHAFFER: Objection.

Just ask if there was anything.

THE COURT: Sustained.

Q. Who did the cooking?

A. I did.

Q. Who did the housecleaning?

A. I did.

Q. Who did the shopping?

A. Me and my husband.

Q. How would you get from your apartment to the supermarket?

A. Walk. It's right up the block.

Q. When you say you and your husband, you mean he would go with you and help you carry back the bundles?

A. Yes.

Q. If you had to just run out for a carton of milk during the week, I assume you could do that by yourself.

A. Yes.

Q. How about things around the house, if anything broke or if anything needed fixing, things like that? Did

Ronald --

MR. SCHAFFER: Objection. Assuming such incidents occurred.

THE COURT: I think we can take judicial notice such things happened.

Q. Did Ronald do any of those things?

A. Yes, whatever broke, he fixed.

Q. On the occasions when you went to either visit your parents or his mother, would that be by automobile?

A. Yes.

Q. Who would drive?

A. He would.

Q. Mrs. Lavender, at some point on October 31, 1974, were you notified that your husband had been in an accident?

A. Yes.

Q. Did you go someplace after you got that notification?

A. Yes. A cop came and rang my bell and gave me a note saying that my husband had been in an accident and where it was. Then I called a cab and the cab took me to St. Claire's Hospital.

Q. Did you see your husband at any time in St. Claire's Hospital?

A. Yes.

Q. Do you know about what time during the day it was that you saw him?

A. It was when I got there, about ten, fifteen minutes after I got there. I got there about five, after five.

Q. You saw him somewhere between 5:15 and 5:30?

A. Right.

Q. Would that be in the early morning or in the afternoon?

A. Early morning.

Q. Where was Ronald when you saw him?

A. In intensive care.

Q. Can you describe the way he looked when you saw him?

A. He had tubes up his nose and I think tubes for his ear. He talked. He was conscious.

Q. Did you see anything about him, any signs of physical injury that you could see at all?

A. No, just a bump on his head.

Q. You mentioned that he talked. What did he say to you, what did you say to him?

A. Well, when I first went in, the first thing he asked is who has the baby. I said my neighbor, next-door neighbor. And then he says did you call my mother. I said yes, your mother knows and then he says that he was dry, he wanted water and the nun said he can't have none because he was going to be operated on and then he started talking to me that he loved me and my daughter and he said please don't let me die, and then I passed out.

Q. Was that the last time you ever saw him?

A. Yes.

Q. Mrs. Lavender, I suppose I should apologize first but I have to ask you some of these questions. From the time you were married up to the present time, is Ronald Lavender the only man whom you have had physical relations with?

A. Yes.

Q. Have you remarried since his death?

A. No.

Q. Have you dated anyone since his death?

MR. SCHAFFER: Your Honor, this is a strange objection for defense counsel to be making but Mr. Ginsberg knows very well all of those things are irrelevant and if I asked about them, they would be objected to as being inconsequential in a wrongful death case and I am going to object to his asking them.

THE COURT: I'm not so sure that you're right.

MR. GINSBERG: I disagree, your Honor. It's true he might not ask some of the questions because of the public policy --

THE COURT: I will allow her to answer.

Q. Have you dated anyone since Ronald's death?

A. A few, but nothing serious.

Q. You are not involved with anybody at the present time?

A. No.

Q. Do you and yours and Ronald's daughter still live together at the same address?

A. Yes.

Q. And are you still paying the same rent?

A. Yes.

Q. Has it gone up since he passed away?

A. No, the same thing.

Q. Mrs. Lavender, I will hand you these documents and ask you whether those are the funeral and cemetery bills for your husband.

A. Yes, they are.

MR. GINSBERG: I will offer those in evidence.

MR. SCHAFFER: Before we offer them in evidence, will you establish that Mrs. Lavender paid them? Otherwise I have no objection.

THE WITNESS: They're both paid.

MR. SCHAFFER: I have no objection.

xxx (Plaintiff's Exhibits 22 and 23 received in evidence.)

CROSS EXAMINATION

BY MR. SCHAFFER:

Q. Mrs. Lavender, with respect to the bills, Plaintiff's 22 and 23, did you pay them?

A. Yes, I did.

Q. Mrs. Lavender, after the conversation with your husband in the hospital room, which you have just testified to, did you remain in the hospital for the remainder of that day?

A. Yes, I did.

Q. Did there come a time when Ronald was taken to be operated on?

A. Yes.

Q. Did you actually see them come and take him to the operating room?

A. No.

Q. Did you leave the intensive care unit after the conversation you just described?

A. Yes. They took me out because I passed out. That was the last.

Q. Mrs. Lavender, what is the state of your health?

A. Good.

Q. Have you had any illnesses in the last five years?

A. No.

Q. Do you smoke?

A. Yes.

Q. About how many cigarettes a day do you smoke?

A. About two packs a day.

Q. What about your late husband Ronald, did he smoke?

A. Yes.

Q. About how many cigarettes did he smoke per day?

A. About the same.

Q. At the time of his death, what was your husband's state of health?

A. Good.

Q. Had he had any illnesses during the time you were married?

A. No.

Q. Mrs. Lavender, did your husband drink?

A. No. Only on occasions like weddings but otherwise he didn't.

Q. What about yourself?

A. No.

Q. You mentioned before that your husband would generally take approximately $5 with him each day and that was for carfare and lunch.

A. Yes.

Q. Except for the lunch meal, did he eat his other meals at home?

A. Yes.

Q. And on those weekends when he went fishing, would he take money with him for those excursions?

A. Yes.

Q. Did he generally take his car on those trips?

A. Most of the time he took his car.

Q. Did he purchase equipment in connection with that pastime? Did he purchase reels and --

A. Yes, fishing, he had fishing poles and reels.

Q. You stated before, I believe, in answer to his Honor's question, that you didn't have a checking account during the time you were married, is that correct?

A. Right.

Q. Did you have a savings account?

A. No.

Q. During the time that you were married, Mrs. Lavender, did you or your husband do the income tax returns?

A. No.

Q. No to which? Did you do them?

A. No, I didn't do them.

Q. Did he do them?

A. No. This friend of ours did it.

Q. During the time that you were married, did you and your husband have any outstanding loans of which you had to pay interest?

A. No, not that I know of.

Q. Did you have any significant medical expenses?

A. No, beside the baby, nothing else.

MR. SCHAFFER: I have no further questions. Thank you.

MR. GINSBERG: Just one to clarify something.

REDIRECT EXAMINATION

BY MR. GINSBERG:

Q. The automobile that you owned, do you know if that had been completely paid for or were you making payments on it?

A. He bought that from my brother so it was paid.

MR. GINSBERG: I have no further questions.

THE COURT: Thank you very much.

(Witness excused.)

MR. GINSBERG: If the Court please, as I indicated, I have the economist coming tomorrow morning and I did want to note, I had attempted to bring one of the Lavender neighbors in but the person who I attempted to bring in apparently was ill in bed and I may bring in the witness, with the Court's permission, tomorrow. It will take five or ten minutes.

THE COURT: Incidentally, I think I will strike out the testimony about the insurance policy so the record is clear with regard to that. This is the testimony given by Mr. Luger, Sr. as to the receipt of the insurance policy and the income therefrom.

I am still reserving decision on the 26 per cent. That is very troublesome.

In any event, I will then see you in the morning, 10:00 o'clock.

(At 4:10 p.m., an adjournment was taken to Wednesday, January 19, 1977 at 10:00 a.m.)

CAROL LAVENDER, et al.

vs. 75 Civ. 3520 (RO)

UNITED STATES OF AMERICA

New York, New York
January 19, 1977 - 10:05 a.m.

* * * *

Trial resumed.

* * * *

(In open court.)

MR. GINSBERG: I have a couple of schedule situations, your Honor, either on or off the record.

THE COURT: I suppose off.

(Discussion off the record.)

DOMINICK MOLE,

called as a witness by the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GINSBERG:

Q. Mr. Mole, by whom are you employed, sir?

A. New York Navy Support Activity, Department of Defense, the old navy yard.

Q. The Federal Government?

A. That's right.

Q. How long have you been employed by the United

States?

A. Thirty-six years.

Q. Your address, sir?

A. 6621 Grand Avenue, Maspeth.

Q. Is that the same building Mrs. Lavender lives in and her late husband lived?

A. That's correct.

Q. Mr. Mole, there has been testimony that's an apartment house.

Where is your apartment in relation to the Lavender apartment?

A. Right across the way.

Q. Mr. Mole, did you move into the building first or --

A. It was like a day in-between. They're in first, and then we came in, you know what I mean, about two days or something like that.

Q. In other words, you moved in about the same time?

A. About the same average time.

Q. Mr. Mole, how often would you see Mr. Lavender when he was alive?

A. Back and forth and after awhile we would get to know each other, you know what I mean. It was an acquaintance for awhile. Then, I was like a father to him, you know what I mean.

Q. Mr. Mole, are you familiar with what Mr. Lavender would do when he would come home, the time he was on the day shift, when he would come home at the end of the day? Would you ever see him on those occasions?

A. He would come into my apartment at times, sit down, have coffee, shoot the breeze, you know what I mean. The American --

Q. When he would come into your apartment, would he come in by himself or anyone else?

A. His wife and the child. The baby. We used to have it alongside of us when it was a baby.

Q. What would he do insofar as his child was concerned, if anything, when he would be in your apartment?

A. What do you mean? What did you say, sir?

THE COURT: Mr. Mole, you are really being asked what kind of a father he was.

THE WITNESS: Very good father. He took very good care of the child.

THE COURT: Tell us a little about that. What did you see?

Q. What did you see him do?

A. Hold the baby, close to the baby and, you know, affection to the baby, watched the baby, you know what I mean, like a father would.

Q. Would he do that when he was in your apartment?

A. That's correct. I know that.

Q. Mr. Mole, as a next-door neighbor, across the hall, were you familiar in general with Mr. Lavender's life? Do you know whether he went out every night, stayed home at night or do you know what he did?

A. He used to stay home with his wife. He would be in the apartment because he was tired. He wouldn't go out at night. Naturally, he worked hard, he was a hard worker.

Q. Mr. Mole, as far as the weekends were concerned, were you familiar with what he would do on the weekends?

A. When the fishing season was open, he would go out with the boys, I guess, his own boys, young fellows.

Q. If it wasn't the fishing season, do you know what he would be doing?

A. He would be with me or his mother on the Island.

Q. Long Island?

A. Long Island. Or her mother. That's about it.

Q. Mr. Mole, on the average five-night workweek or five-day workweek, how many days out of those five, how many evenings out of those five would he come to your apartment with his wife and daughter to shoot the breeze?

A. He would be mostly in there with me shooting the breeze, you know.

Q. When you say "mostly," would that be five nights out of five or --

A. He would be with the wife, kaffeeklatsch, the American family.

Q. Would any of the other neighbors be there?

A. There was Stella.

Q. Was she also in the apartment house?

A. Yes, downstairs.

Q. Listen close to my question.

Out of a five-day workweek, how many nights would he be there, all five, four, three, two, one?

A. Three or four times, I would say, average.

MR. GINSBERG: Mr. Mole, thank you very much.

CROSS EXAMINATION

BY MR. SCHAFFER:

Q. Mr. Mole, I just have one question.

Could you tell me when the fishing season is?

A. I don't know. I'm not a fisherman. I don't indulge in that kind of sport.

MR. SCHAFFER: Thank you very much.

THE COURT: Mr. Mole, just for my curiosity, I gather from what you are telling us, Mr. Lavender would drop in to your apartment most nights when he came home from work.

THE WITNESS: Talk, kid around, joke around, you know what I mean, Judge.

THE COURT: He came to your apartment most nights?

THE WITNESS: Well, three times, four times.

THE COURT: I take it you are married.

THE WITNESS: That's right.

THE COURT: You have children of your own?

THE WITNESS: My boy died at an early age.

THE COURT: I gather you regarded Mr. Lavender sort of as a son and he regarded you as a father?

THE WITNESS: Yes.

THE COURT: Thank you.

MR. GINSBERG: That's all I have, your Honor.

May I impose on the Court to make a quick one-minute phone call to see what the Con Edison man is doing?

THE COURT: Yes.

(Witness excused.)

(Pause.)

MR. GINSBERG: Your Honor, maybe I should indicate for the record what the connection is going to be or should I not.

THE COURT: You have talked to somebody at Con Ed who tells you they are going to testify about thus-and-so, fringe benefits and so on?

MR. GINSBERG: Only fringe benefits.

THE COURT: That's the only piece of your foundation that is missing at this point, is that right?

MR. GINSBERG: That's correct, your Honor.

Maybe if I could just take thirty seconds to explain. Before Professor Berenson prepared his written report, he called somebody at Con Ed to get some information about fringe benefits. That is incorporated in the written report. I have now arranged for not the same person but the superior of that person to be here and they tell me he is leaving now and will be here.

THE COURT: Why doesn't Professor Berenson come up and the information can be furnished after.

MR. GINSBERG: As a matter of fact, your Honor, I may be able to take Professor Berenson on the Luger first where the information isn't necessary. Perhaps the gentleman will then be here.

CONRAD BERENSON,

called as a witness by the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GINSBERG:

Q. Professor Berenson, could you tell us your occupation, sir?

A. Yes, I'm a professor at the Graduate School of Business at the City University of New York.

Q. Could you tell us what subjects you have taught in the last few years at the school that you have mentioned?

A. I have taught over the years courses such as personnel management, job analysis, economics, business forecasting, market research, research analysis, marketing, business policies, et cetera.

Q. Professor Berenson, can you tell us something about your academic background, sir?

MR. SCHAFFER: If it please the Court, the defense is willing to stipulate to Mr. Berenson's qualifications as a witness. We have been provided with his resume. We will stipulate to his qualifications and simply put his resume into the record.

THE COURT: Why don't we do that. Why don't you hand it up and we will mark it as an exhibit.

xxx (Plaintiff's Exhibit 24 received in evidence.)

BY MR. GINSBERG:

Q. Professor Berenson, at the request of my office, within the last couple of months did you prepare an analysis of projected economic losses in the case of both John Luger and Ronald Lavender, deceased?

A. I did.

Q. If I might ask you, Professor Berenson, to first turn to the case of John Luger.

A. Sure.

Q. Professor Berenson, were you asked to assume, and if so I would also ask you to assume for the purpose of your testimony here today, that Mr. Luger was born on June 12, 1954, that he was Caucasian and male, that he died on October 31, 1974, making his age at the time of death 20.4 years, that he was employed as a Mechanic Class B at the Consolidated Edison Company of New York, that he was single, residing with his parents, that his mother was born on February 28 -- let me withdraw the exact birthday -- but that she was 46.7 years old at the time of her son's death which would make her 48 at the present time, and that they lived in Floral Park, which I believe is in Nassau County, New York.

Did you make all those assumptions?

A. Yes, I did.

Q. Professor Berenson, I will also ask you to assume for the purpose of your testimony that his father's age at the present time is 47 years.

Professor Berenson, from the figures concerning the sex, race and age of the decedent, John Luger, did you project statistically both his life expectancy and work expectancy?

A. I did.

Q. First, as far as his life expectancy is concerned, can you tell us the sources of the research or the information that you obtained in that area?

A. Sure.

I obtained his life expectancy from a publication of the United States Department of Health, Education and Welfare, titled, "Vital Statistics of the United States 1973, Life Tables, Volume 2, Section 5, Table 5-3, Page 5-12." That publication, that specific page and table indicate that his life expectancy would be 50.1 years.

Q. Professor Berenson, could you give us just a thirty-second description of what a life-expectancy table is?

A. A life-expectancy table is a compilation of federal statistics concerning the average number of years that male, female, whites, nonwhites, of various ages could be expected to live so that for an individual who was a while male at 20.4 years of age, there is a column that you can look at indicating white male, age 20, age 21 and then you can interpolate between the two numbers and derive a life expectancy, based upon a statistical average compiled by the United States Government as to the number of years a 20.4 year old white male could normally be expected to live.

Q Professor Berenson, concerning the work expectancy, could you indicate the source or sources of your research or information in that area?

A. Sure.

My source for my projection of his work-life expectancy was another U.S. Government publication, this time one of the U.S. Department of Labor Statistics, "Lengths of Working Life for Men and Women, 1970," which appeared in the Monthly Labor Review February 1976, Page 33, Table 2.

Q Professor Berenson, in the assumption that you made for your report and the one I am asking you to make here, which is that Mr. Luger was employed by the Consolidated Edison Company, he was only 20 at the time of his death and if he worked until 65 he would actually have a 45-year future work, those statistics that came out to 39.7 years, are those statistics that include the entire population or are they statistics that only include people who worked for large corporations that are going to stay in business and where there are union guarantees and so on such as Con Edison?

A. My figure for his projection of his work-life expectancy, 39.7 years, obtained from the Monthly Labor Review paper of the United States Government is derived from the experience of a variety of companies. Some very small, some which may be in and out of business in a matter of weeks and some who endure hopefully for many, many years.

Q. I will ask you to assume there has been testimony that as part of the collective bargaining agreement, after ten years a Con Ed employee gets a job security and I will ask you further to assume, I guess everyone is aware of it, Con Ed of course is a major corporation, which is rather unlikely to go out of business in the next few years, assuming those factors, would it be fair to say that the 39.7 is a very conservative figure for somebody who is a Con Ed employee, compared to the rest of the population?

A. Yes.

MR. SCHAFFER: Objection.

THE COURT: I will overrule it but I must say I am not going to give that statement much weight.

Q. Professor Berenson, were you given any further assumptions concerning the contributions or contribution that was being made by the decedent to his family at the time he met his death?

A. Yes.

Q. Can you tell us what assumptions you based your calculations on concerning that particular area?

A. Well, I was told to assume that he had contributed $25 a week to his parents' support in 1973 and $30 a week in 1974. In each case, each year's contribution amounted to just 14 per cent of his gross earnings.

Q. How did you arrive at that 14 per cent figure?

A. The $25 a week times 52 weeks divided by the earnings. In the case of the 1974 earnings, these were annualized since he didn't survive the full year.

Q. Professor Berenson, there has been testimony by the representative who has already testified from Con Edison, that Mr. Luger's 1973 income was the sum of $9,281.01, and his 1974 income for ten months was $9,367.23.

How does that square with the figures that you used in computing the percentages?

A. These are the figures that I used.

Q. For the purpose of your testimony here today, I will ask you to assume those same figures.

Now, Professor Berenson, we have introduced into evidence here four collective bargaining agreements between the Utility Workers Union and Con Edison, starting in 1968, and going up until the present time, the current one still in effect.

Did you make use of these documents in arriving at certain of your calculations?

A. Yes, I did.

Q. Again I will ask you to assume the contents of these documents in answering the questions I am about to put.

Q. Professor Berenson, did you first do a projection of the future wages that would be received by Mr. Luger had he remained at Con Edison?

A. Yes, I made such projection.

Q. In order to make such a projection, did you have to do a historical analysis, at least from 1968 up until the present time, a nine or ten-year period, of the pattern of wages that were paid to Mechanics B at Con Edison?

A. Yes, I studied those wages for each time period specified in the union agreements, there is a minimum and maximum wage indicated. Both the minimum and maximum increased by 7.1 per cent per year from 1968 to the present.

Q. Could you explain how you computed that sort of historical analysis of this wage?

A. December 1, 1968, for example, the minimum wage for Mechanic B specified in the union booklet was 2.50 an hour and the maximum, 3.73 per hour. At the present time the minimum is 4.36, and the maximum 6.49, for Mechanic B. If you take 2.51 per hour, the December '68 wage and you increase that 7.1 per cent each year, so that you end up then with the current figures.

Q. Professor Berenson, insofar as the future projection of Mr. Luger's wages, did you make any assumption concerning whether he would remain at the level of Mechanic B or would move up the promotional level in Con Ed to some other position?

A. I assumed that when he reached the top of the Mechanic B wage scale, that he would move over to the Mechanic A category, and his wages then would be covered by that particular classification.

Q. Did you make any assumption as to whether or not he would achieve a supervisory position such as a foreman?

A. No, I didn't. I merely boosted him from Mechanic B to Mechanic A and stopped at that point.

Q. Perhaps if I could put it in reverse, your figures are on the assumption that he would not have made foreman?

A. That is correct.

Q. Again, if I may ask, assume that there has been testimony in court by a Con Ed foreman, Mr. Sperra, that about 50 per cent of the Mechanic A's ultimately become foreman, would it be fair to say that your figures are on the conservative side because they have not taken into account this 50 per cent chance of promotion?

MR. SCHAFFER: Objection.

THE COURT: Yes. That's sustained. The figures are what they are.

Q. Professor Berenson, could you first indicate before giving us the calculations, the method that you used for projecting Mr. Luger's wages into the future from, I guess, the present time up until the time of the end -- let me withdraw that.

What was the cutoff date that you used in projecting Mr. Luger's wages as far as the future?

A. I used the period of time which was computed to the end of his mother's life expectancy, which was

32.4 years from the date of his death and that comes out to be March 2007. Therefore, the period of time covered is from the date of his death to the time March 2007.

Q. Professor, do you have with you that Government document from Health, Education and Welfare?

A. Yes.

Q. The figure concerning his mother's life expectancy, is that from the present time or from the date of the accident?

A. The date of his accident.

Q. Could you, on the assumption that his father is 47 today and therefore was 45 at the time of the accident, could you tell us what his life expectancy was from the time of the accident?

A. The life expectancy for a 45-year old white male is 27.8 years.

Q. Professor Berenson, so that everyone understands, do I understand what you are saying even though Mr. Luger himself had a statistical work expectancy of 39 years, you didn't compute his wages for that period but only until the time when statistically his last parent would continue to live?

A. That's correct.

Q. Could you tell us the assumption or the method you used in projecting his wages into the future?

A. I assumed of course that he would continue to work for Con Edison, that he would work five days a week for a full year, eight hours a day. I assumed further that his pay would be governed by the contracts that we have been talking about.

I assumed further, as I said before, that when he reached the maximum of the wage scale indicated by the Mechanic B category, he would be moved over to Mechanic A. Therefore, I just went pay period by pay period or I should say contract period by contract period where they indicate both the wage increments within any one level and when there is a general increase, increasing all levels and I computed what his lost wages would have been from the time of his death to the present time, the time of the trial, and then from the present time to 2007, when his mother, his last surviving parent would have died.

Q. Before you give us the calculations, you had indicated your historical analysis indicated a general increase of 7.1 per cent compounded annually.

A. Yes.

Q. Did you assume that figure continuing into the future?

A. No. At the present time I didn't. I made the assumption of what I call a flat projection. That is, I assumed in my first round of computations that there would be no further increases beyond those wage levels established at the present time. So that although from October 31, 1974 to the present there have been, I just froze it at the present level which is 8.30 per hour.

Q. Could you tell us then, based on this frozen wage scale, the amount of earnings that Mr. Luger would have made had he continued to work through the statistical death days of his mother?

A. Sure. His total earnings over that period of time, from the time of his death to the time of his mother's death would have been 535,115.

Q. Did you, Professor Berenson, make any projection using the same historical rate of upward moving of wages of 7.1 per cent?

A. Yes. In addition to the flat projection, the projection which froze wages at the present time, I took into account in a subsequent computation the fact that from 1969 to the present wages had been going up at 7.1 per cent. I took into account the fact that historically this is the pattern for workers in the United States and that inflation is a fact of life in this country and that in response to inflation, there would be subsequent, undoubtedly subsequent wage increments and, therefore, I made a subsequent computation in which I continued the historical increment of 7.1 per cent a year.

However, that's only part of the equation of my subsequent computation.

Q. Professor Berenson, is it a fact that the value of money today is different than paid out over a long period of time and there is something called present value?

A. Yes.

Q. Can you explain to us what present value is?

A. Present value is a concept which recognizes essentially the time value of money. By that I mean, if you wanted to receive a dollar a year from now, you would, for example, put 94 cents in the bank or any other savings place where it is going to earn interest and the 94 cents plus the approximate six per cent interest would give you a dollar that you could then use a year from now.

If you wanted a dollar two years from now, you would put in even a lesser sum than the 94 cents, for example, 88 cents, roughly speaking, which would earn interest at approximately six per cent for two years to provide you that dollar two years from now.

So if we have to ask ourselves the question how much money has to be set aside today to provide so many dollars in 1978 and so many in '79, so many in '80 all the way up to 2007, then we have to recognize in our thinking the time value of money, that is, the discounting to present value, what is the present value of the money to be received sometime in the future, bearing in mind this future sum will be augmented vis-a-vis the present by the interest-bearing capacity that it has.

Q. Professor Berenson, in using your computation or making your computation for present value, did you select a particular interest rate that you used in your computation?

A. Yes, I did. I selected 6.2 per cent.

Q. Professor Berenson, how does 6.2 per cent square, in your opinion, historically over the last twenty or thirty years, let's say, with the actual interest rate that this country has experienced?

A. Well, 6.2 per cent in that historical framework is very, very high. We are at the present time in a period of relatively high interest rates, amongst the highest in that thirty-year period that you cited.

Q. Would I be correct, Professor, that the higher the interest rate you use, the greater the discount would be on the amount?

A. Yes, sure.

Q. Using then these two factors, the historical 7.1 per cent increase in wages that Con Ed employees have been receiving, and on the other hand the 6.2 per cent figure as a discount, did you do a further projection as to the wages that would be lost?

A. Yes, I did. Taking into account these simultaneously operating factors, that is, the upward thrusting effect of the 7.1 per cent annual wage increases on the future wages, and the downward thrusting impact of the discount factor of 6.2 percent, present value, I came out with another figure which provides a wage loss of somewhat higher than that 535,000 I cited before. This time 597,161.

Q. Professor Berenson, the projections that you have done up until the present time, up to the present time as far as your testimony is concerned, were these based on the base pay all by itself or did they include overtime?

A. That was the base-pay computation.

Q. Did you make further calculations which would take into account the overtime?

A. Yes, I did. My analysis of his pay, the pay that he actually received indicated that he had received on the average of 34 per cent overtime pay and, therefore, I made another set of computations which indicated what he would have earned had he continued to receive 34 per cent overtime pay over the same time period that we have been discussing.

Q. First did you do a flat projection with that overtime pay included?

A. Sure. Projected flat, it comes out to 717,000.54. Again when we take into account the wage increase offset by the 6.2 per cent discount present value, we end up with $800,196.

Q. Then finally, Professor Berenson, having arrived at this last figure, concerning all of the income, discounted to present value, that would have been earned by Mr. Luger during the life expectancy of his mother, did you, based on your 14 per cent assumption, which was the current rate of contribution, did you compute what 14 per cent of that amount would be?

A. Yes, I did. 14 per cent of the $597,161 is $83,603 and for the overtime work, the 14 per cent comes out 112,027.

Q. Professor Berenson, there has been, and I can ask you to assume, testimony that the decedent performed certain services for his family, helping his father with repairs and construction, which may be an overglorified word, but a little work around the house, and he drove his mother a couple of times a week to get groceries, that he mowed the lawn and things of that nature.

Have you in any way calculated the value to his parents of those additional services?

A. No, I haven't.

Q. Is there any way that you can? I realize this is not the ordinary husband living with his wife but is there any way of calculating that?

A. Well, we can get a reasonable good projection of what that would amount to if we knew how many hours a week he spent on these tasks and at the very least multiplied it at the minimum wage of 2.30 per hour.

If, for example, if it were ten hours a week, at 2.30 per hour, $23 a week, times fifty-two weeks per year, times the thirty-two year period, and you would have at the very least a rock-bottom estimate, although I shouldn't say rock bottom because some of the things you said he had done, requires more than the minimum wage of 2.30. You can't get painters at 2.30 any more.

MR. GINSBERG: Let me thank you, Professor.

Your Honor, the gentleman from Con Edison is here.

THE COURT: We will excuse you for a minute.

(Witness temporarily excused.)

MR. GINSBERG: Thank you very much, your Honor, for your courtesy.

SHELDON E. REICHARD,

called as a witness by the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GINSBERG:

Q. Mr. Reichard, by whom are you employed, sir?

A. Consolidated Edison Company of New York.

Q. For how long have you been employed by them?

A. Seven and a half years.

Q. Is there a particular department or division of Con Edison that you work in?

A. I'm the manager of Benefits Planning. It's the Benefits Planning Section.

Q. Mr. Reichard, we already have in evidence the collective bargaining agreements going back to 1968 and one booklet entitled, "Explanation of the Consolidated Edison Pension and Benefits Plan," and another one, "Explanation and Summary Weekly Employee Benefits," and then a somewhat more voluminous volume, "The Consolidated Edison Pension and Benefits Plan." So, if necessary, you are permitted to refer to any of those documents either by looking at them or quoting from them in your testimony.

Mr. Reichard, what specifically does the manager of benefits planning concern himself with?

A. With the review and development research of benefit programs for employees.

Q. There has been a term used before you testified, of fringe benefits.

Is that the same as benefits?

A. Yes. Fringe benefits, employee benefits are synonymous.

Q. Mr. Reichard, without going to each tiny little benefit, could you just tell us the named areas of benefits that are received by Con Edison employees in addition to their salary and their overtime?

A. The benefits would really be broken down into two areas. One is the pension plan itself and then other benefits known as welfare benefits. Welfare benefits being hospital, doctor, medical types of benefit programs.

Q. In addition to that, Mr. Reichard, are there certain days off, is the only way I can think of putting it, employees are entitled to, vacation time, sick time, things of that nature in their collective bargaining agreement?

A. Yes, there are.

Q. Does your department concern itself with that area also or are you only concerned with the pension and so-called welfare benefits?

A. Indirectly we would be involved also with those areas.

Q. But I gather you are primarily concerned with pension, medical dental and things of that nature?

A. Yes.

Q. Mr. Reichard, have you personally or has your department made a calculation as to what just the pension and welfare benefit part of the fringe benefits are on a percentage basis of the employee's basic wage?

A. We have done that on an average per employee. Not on any specific employee at a particular wage. Excuse me, we have also done that same kind of calculation for the days off and the vacations, which you asked me about.

Q. Have you had a personal role in any of these calculations, either doing them yourself or supervising people who are doing them or anything of that nature?

A. Yes, I have.

Q. What is the percentage that your department has determined the benefits only consisting of pension and welfare benefits to be of the basic wage?

A. We do this on an annual basis and for the calendar year 1975, that figure would be 26.09 per cent of straight-time payroll.

THE COURT: So I understand you, Mr. Reichard, the medical dental and pension benefits alone, not talking about days off or vacations, but we are talking about medical, dental and pension, you say you calculated for 1975, those ran to 26 per cent of the straight-time payroll?

THE WITNESS: Yes, sir.

THE COURT: I'm a little puzzled because we had a union witness here yesterday, they had figured the entire package ran 26 per cent. We spent sometime yesterday trying to determine what percentage of the total these others were. I gather you are saying he was wrong in that area as far as you are aware?

MR. GINSBERG: I must object, if your Honor please, one witness to characterize the testimony of another.

THE COURT: I don't think it's inappropriate.

THE WITNESS: Your Honor, I could break down the individual benefits if you so desire.

THE COURT: This was Mr. Caulfield. He said the 26 per cent figure they figure was for all the fringe benefits.

THE WITNESS: There is really a figure of 46 per cent that we use as all fringe benefits.

Q. You say your figure was 46 per cent?

A. Yes.

THE COURT: For all fringe benefits, 26 of which goes for the medical, dental and pension?

THE WITNESS: That's correct. The others include legally required benefits, miscellaneous type things that for accounting and tax purposes can be included in what are defined as benefits.

Q. Just so that we are a hundred per cent sure, Mr. Reichard, could you tell us specifically, does that 26.09 per cent include anything else than the pension, medical and dental benefits and, if so, what?

A. It includes group life insurance.

Q. Can you give us, because I wish to be fair, can you give us the figure for that?

A. That is .91 per cent.

Q. Less than 1 per cent?

A. Yes, it is. It also includes matching dues to an employee benefit organization, which is known as the Mutual Aid Society which provide certain benefits, a dues membership organization and the company matches those dues.

Q. Can I stop there for just a moment. What we are trying to do is find out whether this is something that would have benefited Mr. Lavender's family had he lived.

Would you tell us a little bit about what that is, if you can?

A. Well, indirectly, I guess it would benefit the family. It provides certain medical and welfare benefits to the employee, not to the dependents but to the employee, such as certain hospitalization, certain doctor care, certain prescriptions, eye examinations and the like that can be obtained through that organization.

Q. What would the percentage of that be?

A. That percentage is 1.57 per cent.

Q. Is there anything else aside from pension and medical?

A. There are a few miscellaneous items. That would be military pay differential, and that's a .02 per cent; suggested awards -- these are included in the total of 26.09 per cent.

Q. Maybe you can lump these miscellaneous together if they are not too much.

A. All right. They are not too much. It's 1.42 -- excuse me, -- .142

Q. Have we reached the point where everything else is the pension and medical benefits and dental?

A. Yes.

Q. You have indicated a total figure of 46 per cent including vacations, sick leave and so on.

Is there any part of that other 20 per cent that in any way would assist an employee's family? I am thinking of something like do you have tuition programs if the children go to school or something like that?

MR. SCHAFFER: Objection.

THE COURT: What is the objection?

MR. SCHAFFER: The question is leading, your Honor, and, secondly, when we talk about what would benefit the employee's family, we have to make the assumption that the head of the household is deceased and would benefit them -- perhaps that's not clearly put.

There are certain benefits which no longer need be replaced such as obviously, life insurance is the best example, so I think counsel for plaintiff should be a little bit clearer on what he means by "would benefit the family."

THE COURT: Let's hope we are going to get that squared away in the question and answer process. I will overrule the objection at this point.

You may answer.

Q. Do you understand the question?

A. I believe I understand your question.

Included in the total of 46 are items like meal allowance, Social Security payments that the company makes, the unemployment compensation. This gets into some of the legally required types items. A certain portion of our company library, for instance the cafeteria facilities are all included in that additional amount.

Q. Let me just talk about one or two things, if I may, to make sure I understand them.

As far as the meal allowance, what does that mean? If the employee brings his own lunch he gets something additional added onto his salary or --

A. If the employee is required to work overtime and it's beyond a certain number of hours, then if he eats a lunch, it is reimbursable to him.

Q. Therefore, this would in a sense be extra income received by the employee and his family?

THE COURT: No. He is getting paid his lunch. He is being reimbursed for an expense he incurred.

Q. It would save the family budget paying for a lunch?

MR. SCHAFFER: Objection.

THE COURT: Yes, sustained.

MR. GINSBERG: Thank you very much, sir.

CROSS EXAMINATION

BY MR. SCHAFFER:

Q. Mr. Reichard, the bulk of your testimony concerned the welfare and pension benefits. I would like to go over them in some greater detail.

The pension plan, as I understand it, involves both a retirement pension and survival payment to a surviving spouse if the employee or retired employee dies first, is that correct?

A. If you're specifically saying a retired employee dies first, that is correct.

Q. Both of those are aspects of the pension plan?

A. Yes, they are.

Q. There is a life insurance plan as well which is part of the employee benefits, is that correct?

A. That is correct.

Q. Is that life insurance figured in the 26 per cent you gave or the 46 per cent? That is, did you consider life insurance as part of the pension and welfare benefits?

A. It would have been included in both figures. It's included in the 26 per cent and the 26 per cent helps make up the 46-per cent figure.

Q. Now, turning to the welfare benefits which you characterized as being medical and dental benefits, could you at least name or briefly describe what each of those benefits are?

A. Yes. A hospital plan -- excuse me, do you want details on the hospital plan?

Q. If you just itemize them.

A. Hospital plan, doctor plan, a major medical program for dependents of the employee.

Q. The first two that you mentioned, hospital and medical, is that just for the employee or for his family as well?

A. That's for dependents and dependents are classified as a spouse and dependent children to the end of the calendar year attaining age 19.

Q. And the third one was the major medical?

A. Major medical.

Q. That is also for dependents?

A. That covers only dependents. It does not cover the employee. There is a dental plan for dependents; there is a prescription program that covers both the employee and dependents.

Included in the 26 per cent was the Mutual Aid Society which I had mentioned, and that is for the employee only except in the case of blood; for instance, we have a blood bank program which is administered by that society and that would be available to family members as well as the employee.

Q. Is the employee required to participate in that Mutual Aid Society?

A. He is not. It's a voluntary membership organization.

Q. Do you know of your own personal knowledge whether Ronald Lavender had been contributing to the Mutual Aid Society?

A. I do not.

Q. In any event, except for the blood bank, the Mutual Aid Society is a benefit program for the employee and in the absence of that employee, as here where he is now dead, there is no replacement cost to his survivors. It's a benefit which they no longer need, is that a fact?

A. I would agree with you.

Q. Wouldn't that also be true with life insurance benefits, a benefit which need not be replaced in this circumstance?

A. The life insurance covers the employee only.

Q. The figures that you have given, the percentages, how are these calculated?

A. As I mentioned, this is an average cost per employee.

Q. A cost to the company?

A. The cost to the company, right.

Q. And how is that cost calculated? I don't mean as a mechanical matter. Conceptionally, is this what it costs the company to obtain these benefits from a carrier or is this what it cost the company in actually paying out the benefits itself? I take it the benefits are covered by a third-party carrier, is that correct? The company itself is not the insurer, is it?

A. It's mixed. The cost is the net cost of providing these benefits. I'm saying net cost because should there have been insurance premiums paid where there was a dividend, where it was an experience rated contract, then the figures that we use in determining these costs are net costs not what the actual premium paid is.

Q. When you get the figure of 26 per cent, that obviously involves the division of the cost, the absolute cost of providing benefits to the company, divided by the gross payroll, is that correct?

A. The straight-time payroll, right. It does not include overtime.

Q. So that if overtime was included, the percentage would have to drop accordingly.

A. Benefits are based on straight-time payroll. There are no additional benefits accrued as a result of overtime being worked.

Q. But for our purposes here, in evaluating what the lost benefits were, if we are going to figure a total yearly salary which includes both straight wage and overtime, then obviously we cannot use the 26 per cent figure and have to adjust it down accordingly.

MR. SCHAFFER: I withdraw the question.

Q. Going back to the numerator of the fraction we are talking about, the net cost to the employer, part of that cost is payments made by the employer to third-party carriers in the way of premium payments, net premium payments, is that right?

A. Right.

Q. And you also testified part of the benefits are paid directly by the employer, in a sense acting as its own insurer.

A. That's correct.

Q. And therefore in that absolute figure, you also figure in the cost of the employer in paying out benefits as to those items for which there is no third-party carriers, is that correct?

A. I don't understand your question. When you say the cost of to pay out the benefit --

Q. In those areas where you are not insuring the benefit through a third-party carrier, how do you calculate the cost to the employer?

A. The one area, as an example, the dental plan for dependents is what we term a self-insured program. The cost of that program is the actual cost of claims plus an administration fee that we do pay an outside concern to administer the claims payments for us. So that would be an example.

Q. For your clarification, that's what I meant by what's paid out plus claims plus --

A. Yes, it's the total cost.

Q. Mr. Reichard, let me try to clarify one point relating to the question which I asked about before.

When you speak about these percentages as being percentages of straight-base pay, that base pay includes your weekly wage for a normal forty-hour workweek, is that correct?

A. That's correct.

Q. It does not include any overtime, is that correct?

A. That's correct.

Q It also does not include any pay as the result of sick days, as the result of vacation time, as the result of military leave or any of these other benefits which are included in the 20 per cent which forms the differential between your pension plan and welfare benefits on the one hand and the total benefits on the other, is that correct?

A. The straight-time figure does include vacation time, holidays, sick time and specifically I do not know whether it includes military, but it would include, for example, jury duty. It only excludes premium time, those -- items known as premium time.

Q Doesn't that mean when you get to your 46 per cent, you got the same items in the numerator and the denominator of your fraction, that is, you are including your overall benefits as a percentage of straight time, you are including in straight time some of the benefits whose percentage you are taking?

MR. GINSBERG: I think I am going to object to that on the ground of confusion. I don't know if that's a legal objection.

Q Let's take one particular item. Let's take vacation pay.

Vacation pay is one of the benefits which is included in that 46 per cent figure, is that correct?

A. Correct.

Q. Do you have a figure readily available for what vacation pay consist of as a percentage by itself?

A. Yes.

Q. What percentage?

A. Vacations would be 5.95 per cent.

Q. And that is 5.9 per cent of straight-time salary, which you have indicated also includes in it vacation pay?

A. In that case, yes.

Q. Let me come back to a question plaintiff's counsel started to ask on your direct examination.

The 20 per cent which does not include pension and welfare benefits, and you gave examples like meal allowance, employment compensation, company library, cafeteria facilities, vacation pay, sick pay, jury duty, -- have I pretty much exhausted the list?

A. I think the only one you missed was holidays.

Q. As to all of those items, as with life insurance and the Mutual Aid Society which provide benefits only to the employee, there is no replacement cost of those if the head of the household is no longer alive; isn't that correct? These were benefits only to the employee himself?

A. Yes.

MR. SCHAFFER: Thank you. I have no further questions.

REDIRECT EXAMINATION

BY MR. GINSBERG:

Q. Mr. Reichard, as far as the life insurance, is that a steady figure? In other words, from the day an employee comes until the day he leaves, the life insurance benefits are the same or is there any increase in the benefits based on service for the company?

A. Life insurance is based on salary. It's approximately two times annual pay.

Q. An employee with a great deal of seniority, his family will get more insurance if he dies than somebody who has just been there --

MR. SCHAFFER: Objection.

MR. GINSBERG: I will withdraw it.

Q. You had indicated, Mr. Reichard, that the benefits were calculated on a cost to Consolidated Edison, is that correct, as a general statement?

A. Yes.

Q. Do you know, sir, based on your own experience, whether if an individual or an individual family went out to purchase those same benefits in the private insurance market it would be more expensive, less expensive or as expensive as the cost to Con Edison?

MR. SCHAFFER: Objection.

The witness is an employee for Con Ed. He is not an expert in private insurance plans and not representing a private insurance company.

THE COURT: That seems well-taken.

Q. As a person working as a manager in the Benefits Planning Section, as part of your training, have you become familiar with the cost of obtaining various medical, pension and dental benefits in the private sector as well as the sector that Con Ed provides itself?

A. I would not normally do that.

Q. When Con Ed decides whether to insure itself, so to speak, --

THE COURT: No, counsel. Let's not get involved in that.

What counsel is asking is, if a worker dies, do you have any authoritative knowledge of what it might cost a widow to get replacement benefits elsewhere. That's what he is asking.

THE WITNESS: I do not.

BY MR. GINSBERG:

Q. Would you know whether it would be more expensive to get the replacement benefits, even if you don't know the amount?

MR. SCHAFFER: Objection.

THE COURT: I sustain the objection. That was encompassed in the last answer.

MR. SCHAFFER: Just one or two questions, your Honor.

RECROSS EXAMINATION

BY MR. SCHAFFER:

Q. Mr. Reichard, you indicated that life insurance premiums are a function of the salary of the particular employee --

MR. GINSBERG: I'm sorry, I think he said payments, not premiums.

Q. I'm sorry, payments.

Are any of the other benefits similarly related to the salary of the employee?

A. Of the welfare benefits, no.

Q. What about the pension benefits?

A. I would have to say yes, because wage history is part of the formula.

Q. You testified that the percentages that you gave are averaged for all Con Ed employees, is that correct?

A. That's correct.

Q. Does that include managerial employees as well as the union personnel?

A. No. The figure I gave is termed a weekly employee only, union represented employees.

Q. Within that group, is there any weight formula used for deciding how to take into account people within different pay brackets?

A. There is not. As I indicated originally in the testimony, this is an average figure per employee.

MR. SCHAFFER: Thank you, I have no further questions.

MR. GINSBERG: I have no further questions.

THE COURT: Thank you very much, sir.

(Witness excused.)

MR. GINSBERG: Your Honor, the police officer is here.

THE COURT: Officer, come up.

MICHAEL CSEH,

called as a witness by the plaintiff, being first duly sworn, testified as follows:

THE COURT: You are connected with the New York City Police Department?

THE WITNESS: Yes.

THE COURT: What are your duties?

THE WITNESS: Patrolman.

THE COURT: How long have you been doing that?

THE WITNESS: Ten years,--nine years, just about that.

DIRECT EXAMINATION

BY MR. GINSBERG:

Q. Officer, his Honor has already asked the first few questions.

Are you the police officer who responded to an accident on the 31st of October 1974, in the vicinity of Ninth Avenue and 36th Street in Manhattan?

A. Yes.

Q. I know you are on leave from the Criminal Court so I'll try to be as brief as I can.

Do you have a personal recollection of seeing either a Mr. Lavender or a Mr. Luger or both at the scene of the occurrence?

A. Yes, I recall both.

Q. Could you tell us first what you recall about Mr. Luger, the gentleman who was pinned between the Post Office truck and the Con Ed truck?

A. At first we didn't even know he was there. We had to pull --

Q. Would you talk up, please.

A. We had to back the Post Office truck off, I guess it would be the Con Ed truck and at this point, the person in-between the cars fell to the ground and he was put on a stretcher.

Q. Did you have a chance to observe that person at all during the events that you just described?

A. Yes, when we put him on the stretcher.

Q. Can you tell us whether you observed him --

MR. SCHAFFER: Objection.

THE COURT: Yes.

Q. Can you tell us what, if anything, you observed, with your eyes, ears or both about this person?

A. I observed that he was injured very severely.

Q. Did you hear anything coming from this person?

A. I heard moans and groans.

Q. When you say that you observed he was injured severely, could you describe what about his body you noticed?

A. As far as I can recall, his head was cut open and I believe his legs were severed, partially and more cuts.

Q. Officer, as far as the other gentleman, Mr. Lavender, can you tell us what, if anything, you observed about him?

A. Just that he was, I would say, semiconscious or alive and he didn't have any great visible injuries.

THE COURT: Officer, did you try to talk to Mr. Luger?

THE WITNESS: Not really. There was no reason to. We were just trying to get him to the hospital.

THE COURT: Did you hear him say anything that you could understand?

THE WITNESS: No.

THE COURT: Did he look at you in any way as if he was trying to communicate anything to you?

THE WITNESS: No. I don't think he was in any condition even to be looking.

MR. GINSBERG: I have no further questions, thank you.

CROSS EXAMINATION

BY MR. SCHAFFER:

Q. Officer, did you observe Mr. Luger move in any way at the time when you were putting him on the stretcher?

A. No, I couldn't say that.

Q. Did you observe his eyes?

A. No.

Q. You testified that you heard sounds coming from him that sounded like moans.

Were these continuous or did you just hear it once or twice?

A. Just in the beginning. I wouldn't recall if it happened again after that.

Q. When you say in the beginning, would that be at the point at which the trucks were pried apart and he fell to the ground?

A. When he was on a stretcher, put on the stretcher and before he went into the ambulance.

Q. For approximately how long did you hear these sounds?

A. A couple of seconds as far as I can recall.

Q. Before the stretcher was taken into the ambulance, had the sound ceased?

A. I wouldn't remember. I was amazed this person was alive, which I thought he was still alive. I don't remember if I heard any moans after that on the way to the hospital or at the hospital.

Q. You do not know of your own personal knowledge whether he was in fact alive or not?

MR. GINSBERG: I object to that, your Honor.

THE COURT: I will overrule that.

You may answer.

A. I couldn't tell, really. I would say he was in that bad of shape I wouldn't be able to tell.

Q Officer, in your experience as a police officer, have you observed other individuals close to or at the point of death?

A. Yes.

Q On those occasions, have you ever observed a sound being made, something like a groan at or around the point of death?

MR. GINSBERG: Your Honor, I must object.

I don't know what he means by at or around the point of death. I think there is a total difference, shortly before the person dies or after the person is already dead. I think the question is not specific enough.

THE COURT: I think it's a little hard to get into a comparable situation which is what you are faced with here.

I will sustain that objection.

Q Let me rephrase it in terms of at the very point of death, have you observed a person expired and have you ever observed a noise, a moan being made at that moment?

A. I would say somewhat similar, yes.

MR. SCHAFFER: Thank you. I have no further questions.

MR. GINSBERG: I have no further questions.

THE COURT: Officer, thank you very much.

(Witness excused.)

(Recess.)

CONRAD BERENSON, resumed.

DIRECT EXAMINATION CONTINUED

BY MR. GINSBERG:

Q. Professor Berenson, if we may turn from the projection concerning Mr. Luger to that concerning Mr. Lavender, first if I might ask you, for the purpose of your study, did you assume that Mr. Lavender was born on December 28, 1946, which would make him twenty-seven at the time of his death, that he was a white male, that he died on October 31, 1974, so that his age was 27.8 years, that he was employed as a Mechanic Classified A by Consolidated Edison Company, that he had been married to Carol Lavender who was born on February 16, 1947, their ages being within a couple of months of each other and that from the marriage they had a daughter named Debra who was born on August 30, 1972, that they resided in Maspeth, Queens.

Did you make all of those assumptions?

A. Yes, I did.

Q. Professor Berenson, to save a moment by the same process of calculation that you described in the Luger case, did you calculate both the life expectancy and work expectancy of Mr. Lavender?

A. I did.

Q. Could you give us those figures?

A. The life expectancy was 43.5 years and the work-life expectancy, 34.3 years.

Q. Without asking you, sir, would I be correct both his wife and, of course, his daughter had longer life expectancies than did Mr. Lavender?

A. Yes.

Q. In projecting the income from Mr. Lavender up to the present time, and then into the future, did you make any assumptions concerning his continued employment at Con Ed and his position there and so on?

A. Yes. I assumed that he would continue to work solely for Consolidated Edison as a Mechanic A without promotion for the 30.3 years of his work life. I assumed he would work a full year each year, eight hours, five days a week and his pay would be covered by the collective bargaining agreement between the Utility Workers Union and Con Ed.

Q. Again, did you also take into consideration for some of your later calculations the historical analysis that you explained to us by going through the collective bargaining agreements from 1968 through the present?

A. That's correct. Once again, they indicated the same rate of increase.

Q. First of all, based on a flat projection, by that I mean not taking into account the 7.1 per cent increase, not taking into account any overtime, and not taking into account any fringe benefits, did you make a projection simply on the basic forty-hour a week wage loss for Mr. Lavender from the date of the accident until the date of the end of his work expectancy?

A. Yes, I did.

Q. Could you tell us the figure you arrived at for that?

A. Yes. For the base forty-hour workweek on a flat projection, the total wage loss came out to be 587,777.

Q. Following that consideration, did you begin a consideration of fringe benefits?

A. Yes, I did.

Q. Let me ask you, if I may, a few questions about fringe benefits. I know you were here when Mr. Reichard testified about fringe benefits and he testified in terms of the cost to the Consolidated Edison Company of what I will call the welfare pension benefits.

Based on your experience as indicated in the curricula vitae that is now in evidence, do you have an opinion with a reasonable degree of certainty as a professor of economics, marketing and the other subjects that you have taught as to whether it is a more expensive, less expensive or the same cost for an individual to replace the pension and welfare benefits that Mr. Lavender had been receiving by virtue of his employment with the Consolidated Edison Company?

MR. SCHAFFER: Objection.

Your Honor, there is nothing in the resume that would qualify this expert concerning the very specific question concerning the insurance and pension benefits this question involves and I would object to it being answered without a further foundation or voir dire or questioning of this witness.

THE COURT: I will sustain that.

Q. Professor Berenson, in the years of your professorship and your training, have you had occasion to become familiar with the costs of various insurance benefits of the type that we are talking about?

A. Yes, I have.

Q. Could you just give us a very brief resume perhaps as to what areas of your study have caused you to either discuss these items with members of the insurance industry or to do any studies concerning insurance or anything of that nature?

A. To begin with, several of my colleagues are professors of insurance. I speak with them rather frequently. I have had occasion to analyze many, many benefit programs and to read a number of publications dealing with fringe benefits.

One of my published papers is entitled, "Fringe Benefits," and I had to do research for that paper.

My studies over the years have brought me face-to-face on many occasions with a consideration of whether or not an individual -- whether or not the policy to cover an individual for pension and welfare costs would be greater, lesser or the same than a policy written on a group basis and it's a tenant of the insurance --

Q. Don't tell us that before his Honor rules.

Professor Berenson, I would then repeat my question now that you've told us more about your background as to whether you do have an opinion based on your background and your experience as to whether an individual policy as you put it, namely one that would be obtained privately by the Lavender family, would be more expensive or less expensive in terms of cost than the cost to Consolidated Edison of insuring their employees as an entire group of people.

A. I'm sorry, I didn't --

Q. There is no objection so you may answer.

Is it more expensive, less expensive or as expensive?

A. The cost to insure an individual is more than the cost to insure a group.

Q. I will ask you to continue your answer. I think you said that is a basic tenant of the insurance industry.

A. Sure. Group insurance is known widely to be less expensive than an insurance policy taken out for a specific individual.

Q. In the study that you originally did for me, for my office, did you assume a particular percentage figure as representing fringe benefits?

A. Yes, I did.

Q. What was the figure that you used?

A. I used 26.0 per cent.

Q. In actuality, as Mr. Reichard has testified, I think the .9 per cent for life insurance and the 1.5

per cent for mutual aid and the .142 per cent of miscellaneous items which we make a total of about 2.6 per cent would be items of that 26 per cent that might not be applicable to the family.

On the other hand, he --

MR. SCHAFFER: Objection, your Honor.

Is this a question or summation?

THE COURT: I sustain it.

Q. Professor Berenson, the 26 per cent figure that you used, was that taken as a per cent of only the base salary or as a per cent of base salary plus overtime?

A. For the particular calculation that I gave before, of the gross wage loss, this is a percentage of that base gross wage. No overtime computation.

Q. Did you on a flat projection basis calculate up to the present time from now into the future the amount of fringe benefits specifically limited to the pension and welfare type benefits that was lost by Mr. Lavender's family?

A. Yes. I made a computation of just the pension and welfare area.

Q. What figure did you arrive at up until the end of his work expectancy?

A. I got a figure of 152822, 152,822.

Q. Professor Berenson, does an individual who is living in a household, a particular household with a wife and a child, consume a portion of his earnings for his own personal use?

A. Sure.

Q. Are there figures that have been calculated concerning the amount of this personal use consumption?

A. Yes, there have been.

Q. Did you take that factor into account in your next calculation?

A. I did.

Q. What is the source of material that you used in ascertaining this percentage of personal use?

A. I used the Handbook of Labor Statistics, 1975 Reference Addition published by the United States Department of Labor, Bureau of Labor Statistics, Page 359, Table 137.

In addition, I used the Consumer Expenditure Survey Series, 1972, again by the Department of Labor Statistics, 448-1, 1975, Pages 2, 3 and 4.

Q. Professor Berenson, the figures that you ultimately arrived at, are these average figures for all employees in the same general wage area as Mr. Lavender was?

A. Well, the same wage, averages, same general wage area and same family size.

Q. Professor Berenson, in computing these averages, would they include on the one hand a man who comes home virtually every night and spends his time with his wife and family and on the other hand men who perhaps don't come home and spend their nights drinking in bars or out at social clubs or involved in civic and communal activities or does it include all these types of individuals?

MR. SCHAFFER: Objection.

THE COURT: Something is wrong with the question, but I'm not quite sure what.

MR. GINSBERG: I'll be glad to reframe it, your Honor.

THE COURT: These are statistics that are taken from various business sources and there they are, right? They don't get down into the niceties as to a wage earner came home or drank beer or scotch or how much, do they?

THE WITNESS: What they are is an average for all kinds of people.

THE COURT: Let's go on from there.

Q. Would somebody of the type of family life that Mr. Lavender led, without any real outside activities except for his weekend fishing trips, would such a person be, in your opinion, at an area lower than the average or higher than the average as far as personal expenditures from his income is concerned?

MR. SCHAFFER: Objection.

THE COURT: I sustain that objection. I don't need this gentleman to tell the Court that fact.

What is the percentage?

Q. What is the percentage?

A. 25.8 per cent of his gross wage; which is to be deducted from the loss.

Q. And did you calculate that personal consumption expenditure item again for the working life or work expectancy of Mr. Lavender?

A. Sure. The same time frame as utilized for the wage.

Q. What is the total figure for the personal consumption item?

A. That total figure was 151,647.

Q. I guess, in effect, the fringe benefits and personal consumption just about canceled each other out but what was the final total that you arrived at starting with the wages for the basic forty-hour week, projected flat, plus the fringe benefits minus the personal consumption?

A. That total is 588,952.

THE COURT: Professor Berenson, while you were speaking here, I was doing some additions and multiplications.

How do you get to $587,000 as a flat projection of base pay over 34.3 years? Mr. Lavender was earning on an annual basis eleven thousand four. 9500 to ten months which comes to eleven four on a twelve-month basis and there has been testimony here, there has been a 7 per cent increase a year for two years I assume since that time to today. You are not adding any 7 per cent on from that point because this was the flat projection. So, you have eleven thousand four, which is today's earnings, and --

THE WITNESS: May I interject, your Honor?

If we take 52 weeks per year, 40 hours a week, times $8.30 an hour, you get 17,200 --

THE COURT: I don't think that's a justifiable figure. We had testimony that his pay for '74 for ten months was 9506, of straight time and 2801 of overtime. You can't go beyond that.

MR. GINSBERG: I think, your Honor, what Professor Berenson has done, I think there are two figures. There is 7.1 per cent --

THE COURT: He hasn't done that.

MR. GINSBERG: There is a second increase, your Honor, which is in the collective bargaining agreement.

THE COURT: I added that.

MR. GINSBERG: One moves toward the maximum of an A Mechanic.

THE COURT: I added that.

MR. GINSBERG: Mr. Lavender was not at the maximum for A Mechanic.

THE WITNESS: His rate pay at the present time in 1977, had he continued to live, would have been $7.99 per hour. He would have been just a shade under the maximum at that time.

MR. GINSBERG: I think the discrepancy --

THE WITNESS: You used the '74 figures.

THE COURT: And I added the 7 per cent increase a year for two years which increased it by 14 per cent which got me to 12,996, which is basically $13,000 a year.

MR. GINSBERG: What your Honor didn't add was the seniority increase.

THE COURT: Is that 4,000 a year?

THE WITNESS: What I think the difference may be accountable to is that 7.1 per cent I used was the average from '68 through to the present time. From '68 to '71 or '72, wage increments were far lower relatively speaking than they were in the last couple of years when we have had much higher inflation, so that I used the number specifically for the period in which we do have wage agreements, the number specifically contained in the wage agreements.

In terms of future projections for which we don't have wage agreements, I used the historical figure and that's what the difference is.

There is no question that his present wage would have been 7.99 per hour and that comes out to be --

THE COURT: Why is there no question about it?

THE WITNESS: That's in the wage booklet. For Mechanic A in his slot, that's what the wage is, if you just follow through the steps in the booklet.

THE COURT: Mr. Lavender earned on an annual basis eleven thousand four in the year 1974.

Is it your contention that the normal accretion would have added $6,000 a year to his salary in two years?

THE WITNESS: Let's look specifically at the numbers. The rate of pay for Mr. Lavender in 1974 was $5.86 per hour on November 1, '74.

THE COURT: What do you get from that as the annual income, straight time?

THE WITNESS: 12,188.

The rate of pay at the present time --

THE COURT: How can you get to 12,188 when, in fact, on a ten-month basis, he got ninety five and if you add the two-twelfth of the year missing as I get it, you get to eleven four. I have to make an assessment here. The problem I'm dealing with, Mr. Ginsberg is, we have a specific figure.

MR. GINSBERG: Your Honor, I think --

THE COURT: I have to use that as a starting point. I cannot use arbitrary things. I have to use fact as a starting point and go forward from facts.

THE WITNESS: The present wage of 7.99 divided by 5.86, we get a factor of 1.3634. In other words, the present wage is not just 7.1 and 7.1 per cent more. It's roughly 36.35 per cent more.

As I tried to point out, the increases in the last couple of years have been far greater than the increases in '68, '69 and '70 when the consumer price index, for example, was increasing very, very little each year. So, these last couple of years are the years of major wage increases, although in my projection I used an average for a number of years, didn't just take the peak years, the last couple and that's how I got those numbers.

MR. GINSBERG: May I just comment briefly, your Honor. I think I may understand what the confusion is. Or if the Court doesn't --

THE COURT: You go ahead.

BY MR. GINSBERG:

Q. Professor Berenson, let us go to the year 1974. That is the last year that Mr. Lavender was alive.

A. Yes, sir.

Q. Were his wages governed by the collective bargaining agreement then in existence?

A. Yes, sir.

Q. And did this contract provide for certain increases that were to occur to all employees, at a certain percentage basis during 1974, 1975, whatever the length of that contract was?

A. The contract provided for two types of increases. One is what they call a progression increase, that is, people moving up from the minimum to the maximum in a particular labor category.

In addition to that, the contract provided for a general increase in which all categories, even at the maximum, are stepped up.

So, in taking into account an individual who falls somewhere in-between the minimum and maximum, you have to determine not only one type of increase but both because these individuals get both the progression and the general wage increases.

Q. Let me ask you if I might, to step by step show us your calculation from the time of Mr. Lavender's death up until the present time.

A. Would you like that on an hourly basis?

Q. Maybe I can put questions and see if that will be helpful.

When Mr. Lavender died, he had earned a certain amount of money for that ten-month period in 1974, and that sum was $9,506.40.

How did you find out what his hourly rate was in 1974?

A. I checked the -- he was earning at that time 5.705 per hour. That was his wage effective July 1, 1974.

Q. In Mechanic A, there was a variation of wages, minimum, maximum and those in-between.

A. Yes.

Q. How did you determine that Mr. Lavender's was that $5 and whatever it was per hour?

A. It was either a conversation with his employer or some other record I have seen. I don't recall any more. The minimal I should point out, roughly rounded to the nearest cent was 5.41 per hour and I had him slotted in as 5.71. I had him very close to the minimum wage at that time.

Q. What would $5.71 project to per week?

A. $11,877 per year.

Q. That would be for an employee making 5.71 an hour?

A. That's correct.

Q. Since we had his ten-month total of 9500, to add another two months to that would be -- since that, in effect, would be five-sixth of the year, what would it be using the 9500 figure?

A. The number the Judge cited before, 11,400. There is a difference of several hundred dollars there.

Q. Would that difference be accounted for by the fact that in 1974 his income was not the same per week in October as it was in January because of changes in the collective bargaining agreement and seniority raises?

A. That is correct, sir. There was an increase provided for in the contract on November 3 of that year which brought that up to 5.86 and that would represent the difference.

THE COURT: What is the difference?

THE WITNESS: $5.86 per hour.

THE COURT: The difference between 11,000 and what?

MR. GINSBERG: $11,877.

THE COURT: $50 a week more for the last two months?

THE WITNESS: No, it would be roughly 15 cents an hour more times forty hours a week, $6 a week more.

THE COURT: I'm trying to figure out over two months.

THE WITNESS: We have narrowed the difference to a couple of hundred dollars.

THE COURT: $400, $50 a week over two months.

Q. I don't know how quickly you can do this, Professor Berenson, but from the period from January through the end of October in 1974, if you can do this quickly by looking at Plaintiff's Exhibit 15, which is the collective bargaining agreement that was in effect during that period of time, can you ascertain any other increases in salary during that period, either on the basis of seniority or on the basis of the general percentage increase that had been negotiated for?

A. The progression was on November 3, as I cited.

Q May I call your attention, Dr. Berenson, to Page 78 of Plaintiff's Exhibit 15 in evidence, and point out to you the date of April 1, 1974 on the top and April 1, 1973, and does that indicate to you, as far as Mechanic A, which appears on Page 78, a change in the wage rate which went into effect I believe on April 1, '74 according to the document?

A. Yes, there was a change at that time.

Q From what to what?

A. From roughly 5.04 an hour to 5.41 an hour minimum and 6.44 to 6.91 an hour maximum.

Q In terms of per cent, that would be what, perhaps a 9 per cent increase?

A. 7.3 per cent.

Q Would that mean that for the months of January, February and March, Mr. Lavender would be receiving a smaller salary than for the months of April, May, June, July through the end of October?

A. That's correct.

Q When we projected a salary of eleven eight, were you taking into account that change or were you assuming that he was making the same amount for the whole year?

A. I had not taken into account that change since it antedated the period of my computations which started out with his time of death.

Q. Is there any way to tell from that collective bargaining agreement whether -- I call them seniority increases --

A. They call them progression increases.

Q. -- whether any such progression increases had been received? I believe there was testimony that it was $6 a quarter that a person received per week until that person reached the maximum.

A. The progression increase on November 3 was 15 cents per hour. That's your $6 a week.

Q. In addition then on the assumption that the gentleman who testified earlier was correct that that would be on a quarterly basis, would that indicate that there would have been a $6 increase, if we go back from November 1 to August 1, that there would have been another $6 increase May 1, and another $6 increase -- I may have the wrong months.

A. There was a progression increase on April 1, 1974 of 15 cents. There was a progression increase on July 7, 1974, of 15 cents. There were those two increases, in addition to a general increase of 7.3 per cent that I computed a couple of minutes ago.

Q I think you said April.

Would there have been also one February 1?

A. There had been a progression increase -- no, the one prior to this was November 4, '73.

Q When those different increases are taken into account, is it possible for you to tell us the difference between the October paycheck and the January paycheck?

A. The January paycheck would be lower by the amount of those increases. In January his hourly rate was 5.06 and annualized, it would be 10,525, approximately, a year.

Q Could you do that on a weekly basis for January?

A. Yes. $202.40 per week.

Q Could you make the same calculation reflecting the $6 increase in April, the $6 increase in July, and the 7. whatever --

A. On April 1, taking into account both the general increase of 7.3 per cent and progression increase of .15 per hour, 15 cents, rather, not per cent, you get a 5.56 per hourly wage which comes out to be $222.40 per week. That's as of 4/1/74.

Then again, on July 7, '74, the wage had been augmented by another 15 cent per hour progression increase to 5.71, which becomes 228.40 per week.

And then again on November 3, '74, there was an additional 15 cents to 5.86, which gives you 234.40, which is a far cry from the 202.40 at which he started the year. This is where the difference is.

Q. Professor Berenson, so that we are totally clear, in computing your loss for Mr. Lavender, did you take into account these progression increases on these quarterly bases until he reached the maximum?

A. In computing his -- in the flat progression which I gave you the bottom-line figures for before I took it only through the present time which is somewhat below the maximum. The maximum at the present is 8.30 per hour and I used 7.99 per hour because I had not yet taken into account his various increases, not yet reached the maximum in the Mechanic A scale.

Q. So that we are a hundred per cent certain, Plaintiff's Exhibit 14 in evidence, which is the collective bargaining agreement and now in effect, on Page 84, as of October 31, 1976, under Mechanic A, list the maximum according to the document I have as $8.29 1/2 per hour, and you didn't use that figure in your progression. You used even a lesser figure.

A. I used a lesser figure. I mentioned earlier

I had rounded it off to the nearest cent. I used 7.99.

Q. You used that all the way for the next 30 years or whatever --

A. 32.1.

Q. So the flat progression then continued forever at what $7.91 --

A. 7.99 figure.

Q. Rather than the 8.30?

A. Yes. That's the one that provided me with the 587,000.

Q. If we assume the truth of the testimony previously, which is that every quarter the employee gets the promotional raise of $6 a week each quarter, it would only have taken Mr. Lavender another two or three quarters to get up to that $8.30 level?

A. Sure. He was --

MR. SCHAFFER: Objection.

A. He was just two steps from it.

Q. So that, in effect, for the next thirty years, except for the first two or three quarters, let's say for the next thirty-one years, you have taken a lesser figure than he actually would have been earning had he remained there?

A. Yes.

THE COURT: And we expect may have achieved.

MR. GINSBERG: I agree with your Honor, yes.

THE WITNESS: I think I made a mistake in what I said. I used the 7.99 for the present period but since we are only two quarters away and the existing contract provides for it, I did step him up for the next two steps to 8.30, and that's how I got that figure.

I'm sorry I misinformed you.

MR. GINSBERG: I misunderstood. I'm sorry also.

Q. In other words, you did figure what he actually would have earned pursuant to the contract now in existence?

A. Yes.

Q. I think we had left at the point where you said the gross wages not including any overtime plus the fringe benefits minus the personal consumption projected out of the figure of $588,952.

A. That's correct.

Q. Did you with Mr. Lavender, as you had with Mr. Luger, take into account the increasing effect of the 7.1 per cent per year and the decreasing effect of reducing to present value at the 6.2 per cent interest rate?

A. Yes, I did.

Q. Taking those two into account, what was the figure that you came to?

A. $668,670.

Q. We have been talking to this point without including any overtime pay or as they call it at Con Ed, premium pay, is that correct?

A. That's right. Just the base workweek has been considered.

Q. Did you then make a further calculation in which you added overtime pay at the rate that Mr. Lavender had been receiving for the last couple of years?

A. Yes, I did.

Q. Can you tell us the final total that you arrived at now considering all of the factors of the flat progression, the 7.1 per cent increase, the fringe benefits, the subtraction for personal consumption, and now adding the amount for overtime?

A. Yes. In a similar fashion that computation was made and the net figure is 744,878. I'm sorry, but that was the projected flat figure. Taking into account the increases and decreases, it becomes 845,709.

Q. That is when the 7.1 and 6.2 factors are considered?

A. When we take into account, yes, increase and decrease considerations.

Q. That was $845,709?

A. Yes.

Q. Do you have an opinion with reasonable certainty, as a professor of economics and based on your experience in the subjects that you have told us you have been involved in teaching, as to whether that figure is a fair and reasonable projection of the economic loss sustained by Mr. Lavender's family projected into the future as it can be best determined by the statistical data available to us at the present time?

A. Yes, in my opinion that is a fair presentation of his job-related economic loss.

Q. Let me just ask one thing about his job and then turn to the next subject.

Did you in any way take into account the possibility that Mr. Lavender might be promoted to foreman for which there is apparently about a 50 per cent possibility and that promotion would make a 30 per cent increase in the wages?

A. No, I kept him as a Mechanic A. The only thing I did is give him the last progression increases, 30 cents total called for in the present wage agreement.

Q. The statistics that you have given to us concerning life expectancy and work expectancy, show that there would be an approximate 9.2 year difference between the two. In other words, if the statistics were accurate for the last 9.2 years of his life, Mr. Lavender would not be working at Con Edison?

A. That's correct.

Q. Did you in any way take into account any part-time employment that he might have obtained during these last 9.2 years?

A. I attributed no economic value to those years.

Q. Did you take into account in any way the loss in Social Security income that his family would sustain as a result of his not being alive during those last 9.2 years?

A. I didn't.

Q. And without giving us the amounts, would it be fair to say that statistically those items also have monetary value for the family of a workingman?

A. Yes.

Q. Did you, Professor Berenson, make calculations concerning the services that are performed by a husband and father around the household, based on statistical and documentary studies that have been done?

A. Yes, I did.

Q. Can you tell us what source materials, if any, you based your projections and research upon?

A. There is a report by the United States Government published in the Family Economics Review, fall 1973, Consumer and Economics Institute Agricultural Research Service, U.S. Department of Agriculture, Pages 8 through 13, entitled "Time And Its Dollar Value in Household Work," written by Walker and Gauger, which sets forth a monetary value for again average households where the individual in the household are of certain age, male, female, as to how much would be spent in the normal array of household services, on the part of the male, minor lifting and repairing, and helping with the shopping, that kind of thing.

Q. Based on your study, did you arrive at an annual figure at the present time for these particular services?

A. I did use annual figures but they vary, since family composition changes, and therefore the figure that I used in my bottom-line composition, my bottom-line computation is one which take into account these changes in the annual numbers and my overall loss in terms of the value of the household services, my computation of that loss from the time of his death to the time that he would have otherwise died had he lived a normal life expectancy, would have been 89,279. This is incidentally discounted at the present value figure.

Q. May I ask, just so we are certain as to what figures you did consider in those items, did you take into account any inflationary factor in arriving at the 89,000 figure?

A. Yes. Once again I computed so that I took into account the opposing concerns on the one hand, discounting for present value, pushing down the value of future earnings and increases in the cost of this kind of work, pushing up that value; once again these are opposing. And projected flat, it had been 94,168.

In this particular instance, the downward thrusting, the discount factor was higher than my projected cost of increase for that kind of work and, therefore, the net figure after discounting the present value and after taking into account that wage inflation was 89,279.

Q. Would the reason that the figure be downward in this instance because you were taking into account life expectancy which would be an extra 9.2 years so the discounting would be greater than for the work expectancy?

A. No. The difference here is attributable to the fact that in the prior instance we were dealing with wages. His particular union had gotten from '68 through the present contract 7.1 per cent a year.

Now, we are not talking about a Con Ed Mechanic A any longer. We are talking about the kind of people, if he is now alive, would necessarily do the painting, minor carpentry, repair and lifting and carrying, and the Government's statistics for that kind of wage increase over the last few years show not a 7.1 per cent annual increase but 5.1. The upward thrust factors are less than the downward thrusting, so the net figure after discounting is lower than the flat projection.

Q. Adding those figures together, the loss from the Consolidated Edison job, not counting the possibility of his becoming a foreman and the loss from the household services not performed, I believe your total was $934,988.

A. That's correct, for the overtime condition.

Q. You mean including overtime?

A. Yes.

Q. Did you in any way take into account the loss of society, companionship or consortium that a husband would give to his wife?

A. No, I didn't.

Q. Did you in any way take into account in the $934,000-plus figure in any way the loss of parental care and guidance that a father would be expected to give to his daughter?

A. No, I didn't.

MR. GINSBERG: Thank you. I have no further questions.

CROSS EXAMINATION

BY MR. SCHAFFER:

Q. Dr. Berenson, let me proceed in the same order that plaintiff's counsel has and begin with your estimates for Mr. Luger's lifetime earnings and contributions to his parents. Let's start with the key area, the question of contributions.

You have assumed for purposes of your analysis that Mr. Luger will continue throughout the life expectancy of his mother to contribute 14 per cent of his gross earnings every year, is that correct?

A. That's right.

Q. You arrived at that 14 per cent figure based upon the $25 per week contribution in 1973 and the $30 a week contribution for the first ten months of 1974, is that correct?

A. Correct.

Q. Mr. Berenson, as an economist, wouldn't a projection based upon a two-year sample be a rather shaky projection?

A. I would much have preferred the thirty-year sample but it's the only sample we have.

Q. It is not, however, a very reliable sample, is it?

A. In terms of reliable compared to the absolute, it is less than absolute certainly. It's the best projection available because it represents the only information we have.

Q. But in terms of if not absolute certainty, the term of certainty statisticians normally deal in, you would have to say it is not a very reliable projection?

A. I would say it is not the best possible projection, certainly not, but we had only a two-year history to go on. In a sense, it's the complete record and when you have nothing but the complete record to use, in this case although the record is a limited one in sense of time, you must use it.

THE COURT: What Mr. Schaffer is saying statisticians have certain criteria they apply.

THE WITNESS: Yes. The more extensive the historical record, the better off you are and that's why, for example, I didn't use the great wage increases of the last couple of years and I went back many more years.

THE COURT: Given the criteria statisticians apply, would you say the two-year experience is good, bad or indifferent? I am talking about the standard you apply in your field in evaluating the materials that you use.

THE WITNESS: It's less than I would have liked to have used, less than I would call good. He might have given more in the future, he might have given less. We have no way of knowing.

[illegible] Mr. Berenson, in addition, the problem we are dealing with is one of contribution to one's parents, family expenses, that contribution would be based upon the need of one's parents, would it not, the economic need of one's parents?

A. In part.

THE COURT: Mr. Schaffer, it seems to me you don't really need to cross examine in this area. This is a matter for argument. All, as I understand, the professor has done here is to take certain figures and run them out. Much of what you have done is a matter of mathematics.

THE WITNESS: That's correct.

THE COURT: I would think it legitimate for you to inquire as to whether he regards certain factors as a good basis for running it out, but as to these matters of whether a son would continue to contribute or not, those are matters really beyond his ken because he didn't get into that.

MR. SCHAFFER: I will save that for argument, your Honor.

Q. Let me ask one other question concerning the 14 per cent figure which I believe would be of relevance to a statistician or economist.

As a member of the Luger household, the deceased John Luger would also have consumed certain household services or goods, in particular food, including also utilities, et cetera, and the figure that you have used in making your projection, is really a gross figure of contribution rather than a net figure. That is, it fails to take into account his consumption within the household, doesn't it?

A. This is the figure that represents what would have been given to his parents.

Q. It does not represent the loss to his parents as a result of the loss of that contribution, that is, the net loss to his parents?

A. I'm afraid I don't follow you.

Q. If I live in a household in which I add $15 a week to the family expenses, just to use an example, I contribute $30 a week, then my net contribution to that household is only 15 a week and the projection you have made is the projection of his gross contribution rather than his net contribution.

A. Now I understand it. That's correct. Of course I should state too I didn't include the value of his household contribution in terms of services.

Q. Let's talk about his household contributions also. We also have to use net figures there if you want to know what the overall contribution is.

Wouldn't it be true in a household, whereas the evidence here indicates, you had a mother and daughters who performed the cleaning, cooking, laundry-type functions, and where the testimony indicates that the son, his contribution in terms of household services was limited to an occasional mowing of the lawn and some assistance to his father in doing repairs, in a situation like that, wouldn't the son be a net consumer of household services rather than a net contributor?

A. It's hard to judge. I would have to know how much time he spent in the household, how much work he actually did, which can't readily be measured other than cutting the lawn. Just simple things like carrying something heavy from one room to the next.

Q. You referred to tables in connection with your testimony about Mr. Lavender, which showed individual's personal expenditures or, putting it differently, his rate of consumption within a household depending upon the size of the family and the particular age and position of that person in the family.

Do such figures also exist for children within a family in terms of what their personal expenditures are in adding --

A. Just for the family unit.

Q. In the absence of the data such as exact hours of work and type of work, you are really unable to say whether Mr. Luger would have been a net contributor or a net consumer of household services, isn't that true?

A. It's difficult and I didn't indeed put a dollar value in on that.

Q. Moving from the question of percentage of contribution to the calculation as to what his lifetime earnings would have been, again speaking about Mr. Luger, in computing those lifetime earnings, you made no deduction at all for taxes, did you?

A. That's correct.

Q. And as Mr. Luger's earnings increased pursuant to the collective bargaining agreements we now have and using your 7.1 figure for the future, his income tax rates, at least based on current schedules, would have gone up as well, isn't that correct?

A. Sure.

Q. Therefore, the percentage of his contribution to his family as a matter of net income after deducting for taxes would not have stayed the same?

MR. GINSBERG: Your Honor, I must object to that because I think that takes into account that our tax laws are going to remain the same and I don't think anybody has knowledge of that.

MR. SCHAFFER: Your Honor, I withdraw the question. The fact is established the calculation does not include taxes in any way. I think that's sufficient.

Q. In calculating the total earnings of Mr. Luger through the expected life expectancy of his mother, you made an assumption that 34 per cent of his gross base wage would be then added on as representing his overtime earnings, is that correct?

A. For the overtime calculation.

Q. On what do you base the 34 per cent figure?

A. The earnings actually reported on his W-2 statements for '73 and '74 versus a computation of what he would have earned taken from the base hourly wages if there had been no overtime.

Q. So that you took his overtime earnings for 1974 and divided it by his base earnings, without overtime for 1974, and that's where you got the 34 per cent figure?

A. I averaged the '74 and the '73 figures.

THE COURT: Mr. Schaffer, are you going to be much longer?

MR. SCHAFFER: I am afraid I will, your Honor.

THE COURT: We will recess for lunch until ten after two.

(At 1 p.m., a luncheon recess was taken.)

AFTERNOON SESSION

2:10 p.m.

CONRAD BERENSON, resumed.

CROSS EXAMINATION CONTINUED

BY MR. SCHAFFER:

Q. Dr. Berenson, we were at the point of considering the assumption you made in computing the overtime lost for Mr. Luger as that 34 per cent figure.

I believe you had just testified that you obtained that 34 per cent figure by averaging the overtime payments for 1973 and the first ten months of 1974, and dividing that by the base wage, for those two time periods, is that correct?

A. The difference in earnings for two years, as a percentage of those two years was used.

Q. That differential, would it include anything other than overtime?

A. No, just the actual earnings reported on the W-2 versus the base earnings taken from these wage agreements.

Q. You then assumed that the percentage, 34 per cent, would continue throughout the remainder of Mr. Luger's work life, is that correct?

A. That's correct.

Q. As with the projection as to contribution, you would admit here as well that a two-year sample is a rather incomplete sample with a statistician's point of view, would you not?

A. It's less than one would hope for but, again, it's the only one available.

Q. Is it not also true, Dr. Berenson, that the assumption the rate of overtime would continue at a constant rate might very well be unrealistic in view of an individual's increasing age, possible greater commitments toward family life and, therefore, unavailability for as much overtime as when he was a youth and that in all probability that percentage would decline over time?

A. No. We really have no way of knowing but you've only talked about some of the possibilities or others. With greater seniority, the access for overtime would be greater and perhaps increase in family size would motivate him more. We don't know whether it would be more or less. Once again, I had to go on the track record we had, so to speak, which indicated 34 per cent.

Q. Let's turn to your estimates concerning Mr. Lavender now.

In the first place, I take it that it is equally true Mr. Lavender, as was with Mr. Luger, your estimate made no provision for taxes, state or federal.

A. No.

Q. It is an estimate based over a lifetime?

A. Yes.

Q. In estimating those gross earnings over a lifetime, what did you use as your cutoff? That is, at what point did you stop your earnings progression?

A. The end of his work-life expectancy?

Q. Yes.

A. The total period of 34.3 years beyond the date of the accident.

Q. Therefore, that final figure you gave us, I believe of $845,709 was a figure which would take into account various increases and deductions and reduction of the present value, was the lost earnings during his expected work-life expectancy?

A. Yes.

Q. In basing your estimate on work-life expectancy, I believe you testified that this figure of work-life expectancy is an average taken from a large number of individuals, is that correct?

A. Yes.

Q. As an alternative to the use of that figure, a statistician or economist could properly take each year of the life and as to that year apply a probability that the individual would survive one more year and then sum all of those up.

That would also be a proper procedure, would it not?

A. Yes.

Q. In choosing an average method as you have, that is, by using the average work-life expectancy rather than by taking it year by year, doesn't that tend to place somewhat overemphasis on the working years as opposed to the retirement years? That is, it makes the assumption that there is a hundred per cent probability that the individual will survive all of his working years.

A. Quite the contrary. It works the reverse way. My method of computation provides a lower number for work-life expectancy and therefore a lower and more conservative estimate or projection of the wage loss. Let me explain why.

I am using the work-life expectancy as of the date of death, 1974, for each year beyond that, that the deceased might have continued to live, there is an additional probability that has to be considered. The government work-life expectancy tables show that as you go from an individual who is aged 28 approximately, 27.8 at the time he died, who is aged 28 to one who is aged 30, 32, et cetera, you don't use for example in going from age 28 to age 38 in assessing the life expectancy, 34.3. When you get to 38, it isn't 14.3 but it is a higher number. Actually what you are saying to me is I should have taken, and you may be right, I would end up with a greater number for work-life expectancy, I should have taken each year's work-life expectancy and cumulated that over the 32 year point 4 period and --

Q. I understand what you are saying about work-life expectancy but I'm afraid you misunderstood my question.

Under the collective bargaining agreement, one is entitled to retire at the age of 62, is that not correct?

A. I'll have to check that.

Q. Assuming Mr. Lavender had begun work there as he did back in, I believe, early 1971, he would have qualified for a full pension at the age of 62 which happens to be exactly 34 years from the date of his death, so the 34-year work-life expectancy by itself is probably an accurate figure.

What I am asking you though is that you also have to take into account --

MR. GINSBERG: I'm sorry, I hate to interrupt. I think he left one thought --

THE COURT: We are getting now to the question.

MR. GINSBERG: I just want to object to the prior statement as it being accurate as one could take 65 as the accurate figure.

Q. Would you agree, Dr. Berenson, that in view of the possibility of retiring with a full pension at the age of 62, plus the governmental data upon which you have relied that the 34 - year work-life expectancy is a probable and accurate figure?

A. I used it. It seemed to me to be a probable figure.

Q. The question I asked before is a little bit different. It really pertains to the life expectancy and not work-life expectancy. That is to say, you make the assumption not merely that there will be a 34-year work-life expectancy, but that the individual in this case, Mr. Lavender, would have survived with 100 per cent probability up to and through his work-life expectancy.

As a matter of fact, for each year of his life, there is a probability figure for the survival of the next year or if you wish the survival through the work-life expectancy, is that not correct? That would be another way of approaching this problem?

A. Sure.

Q. By your assuming with 100 per cent certainty that Mr. Lavender would have lived through his work-life expectancy, does not that tend to overemphasize as an average matter his working years in computing the total lost earnings, and underemphasize his postretirement years?

A. I don't believe that it would underestimate his work-life expectancy. There is roughly a 9.2 year difference between work-life and life expectancy in my computations which is ample to accommodate any small differences of the kind you are referring to.

As to the impact upon life expectancy, once again I am using the government table which in itself represents a probability. For those who are living, this is the number of years they would live. I assume that he would live.

Q. Counsel for plaintiff asked you on direct examination a question concerning the relative cost of obtaining pension and welfare benefits. I think the question may have been limited actually to health benefits, for an individual, as opposed to an employee who is obtaining it through a group-type insurance program such as Con Edison had.

In response to that question, you testified that it would be more expensive for an individual.

We are here though concerned, are we not, with the replacement cost to Mrs. Lavender now that she can no longer obtain and no longer has the coverage that she previously had through her husband's employment? That is, the loss to her would be the replacement cost of obtaining those same health insurance benefits, would it not?

MR. GINSBERG: I must object, your Honor.

I think that's a legal question and not an economic question.

THE COURT: No. I think what counsel is asking about is whether it would cost her less for her to get a policy for herself and the child than it costs for two adults and the child through the group plan. I think he says your figures, in effect, would give her the entire benefit of family plan whereas the figures should not reflect --

MR. GINSBERG: I withdraw the objection.

Q It is cheaper to get health insurance for a mother and child than it is for a husband and wife and child, is it not?

A. Sure.

Q. We do not have sufficient data at this point to determine whether the increased cost of obtaining health insurance outside of a group plan would be more than or less than offset by the decreased cost of obtaining health insurance for one adult and child as opposed to two adults and a child. We don't have that information.

A. No, we don't.

Q. These two factors are in a sense at least in direction offsetting factors?

A. Yes, they are.

Q. Moreover, with respect to health insurance, whether if we were dealing with the situation of private insurance, at a certain point in time, the daughter would attain majority and Mrs. Lavender would be concerned only with health insurance for herself, isn't that true?

A. That's correct.

Q. Therefore, that would be another factor pointing in the direction, at least somewhere in the future, of a diminished cost in the situation where one was obtaining private insurance.

MR. GINSBERG: Your Honor, I must object again on legal ground.

This action is brought on behalf of the next of kin and it would include the daughter's cost of obtaining insurance as long as she lives if that's a factor in this case. She doesn't lose her rights in this case when she becomes 19.

MR. SCHAFFER: I think it is clear it applies only to dependents in the collective --

THE COURT: A father is not going to have medical insurance for the daughter past the time when one might normally expect she will get married and have a family of her own.

Q. Under the group insurance plan --

THE COURT: At 19, at Con Ed, the child is no longer covered.

MR. SCHAFFER: The point is, your Honor, there is no evidence so far as to whether or not that results in the reduction of rates.

Q. Do you know the answer to that question, Dr. Berenson? Under the Con Ed plan, would the obtaining of maturity by the dependent, would that result in a reduction in the cost of the plan?

A. Undoubtedly, yes. To set the whole thing clear, if I may amplify a moment, we are talking about an area which in a sense has been conservatively project and let me elaborate --

Q. Dr. Berenson, I would prefer you just answer my questions.

Turning to the question of personal expenditures of the decedent, Mr. Lavender, which you deducted from the earnings in order to reach a figure which would represent the loss to the surviving spouse, you assume that 25.8 per cent of gross wages were to be deducted as personal expenditures, is that correct?

A. Yes.

Q. And you applied that figure straight across-the-board throughout the entire work-life expectancy of Ronald Lavender, did you not?

A. Yes, I did.

Q. In point of fact though, Dr. Berenson, wouldn't Mr. Lavender's percentage of personal expenditures increase over time, particularly at such time as his daughter became independent and left the household?

A. Sure. That's why in making my unilateral across-the-board application of this factor, I took an average figure, one which considers a family size of 2.47 people over the course of his work life because I recognize the fact when the daughter achieves age of maturity, she would no longer be in the family.

Q. This 25.8 per cent figure is based on a two and a half --

A. 2.47 person family, yes, sir.

Q. That's roughly halfway between two and three.

A. Yes.

Q. How did you arrive at 2.47?

A. There are two people, both adults who would be in the household for 34.3 years, the period of work-life expectancy. One individual, daughter, in the household for 16 more years since she was a couple of years -- I took her to age 18. When you multiply 2 by 34.3 times 1 times 16 --

Q. The percentages are a straight-line progression so one can --

A. I don't follow you.

Q. You are assuming, if we picture this personal consumption element as a function on a graph, you are assuming this function is a straight line so that halfway between two and three you are going to get half the personal expenditures?

A. We have to. There is no way of allocating the cost to a quarter or a half a person. You have got to assume a straight-line relationship.

Q. When you reduced the projection of lost earnings to their present value, back until what date did you make that reduction?

A. To the present time.

Q. The present time being today?

A. Actually I misjudged the date of trial. I used January 14 instead of the 19th but the difference would be insignificant.

Q. By reducing it to its present value as of today, you, in effect, gave interest on the lost earnings f[illegible]e date of the accident until the present, did you not? Isn't that the effect of that particular computation?

A. You can't discount a period that's already expired. That would be mathematically improper.

Q. Why?

A. Because that money already not received has no future value. It has lost its capacity to earn interest in the past. The 2.2 period behind us is gone. Money today can't earn interest from yesterday or two more years of yesterday. Money only has the capacity to earn interest into the future.

Q. But if this case were tried the day after the accident?

A. Then you would have used the entire period of 34.3 years.

Q. By reducing to present value as of today, as opposed to October 31, 1974, haven't you, in effect, given interest on the lost earnings from the date of the accident until the present? Isn't that the effect?

A. Well, in a sense.

Q. I raise this with you because it's a legal issue which doesn't concern you, but --

A. Monetarily the impact is trivial, I would say. Philosophically in a sense you might call it an equivalent.

Q. We are talking about over two years of interest at a rate of approximately 6 per cent a year.

A. Applied only to those two years' earnings, not to the entire loss. That's why I say it's a relatively small amount in the context of the lifetime of earnings.

Q. I noticed when you went through your computations with plaintiff's counsel, that you first reached the figure reduced to present value and then reached a total which included overtime.

Did you also reduce the overtime to present value?

A. Sure.

Q. That had been done prior to adding it onto the previous figure?

A. Yes.

Q. And with respect to the loss of household services that would have been performed by Mr. Lavender, the figure you gave there as in the case of Mr. Luger was again a gross figure.

It didn't account for Mr. Lavender's consumption of household services, did it?

MR. GINSBERG: I am only going to object, your Honor, because he didn't give a figure in Mr. Luger's case. He said there was a value but didn't give a figure of the household services performed.

Q. In your estimate, concerning the value of the household services that would have been performed by Mr. Lavender, you didn't take into account in any way the value of the household services consumed by Mr. Lavender, did you?

A. No. My computation was based upon his total contribution of household services. Whatever portion of that he personally consumed, I don't know.

Q. It not only doesn't take into account what proportion of his own household services he consumed, but also doesn't take into account what proportion of his wife's household services he consumed, does it?

A. No. This was strictly a computation of his household services.

Q. Thus, as with Mr. Luger, we do not have before us information sufficient to determine whether Mr. Lavender was a net provider or net consumer of household services, do we?

MR. GINSBERG: Your Honor, I must object to this on legal ground.

I don't think the fact that Mr. Lavender's wife has less cooking to do is a measure of damages that can be discounted by the defendant in this case. I think it's a question of his services, the fact that she has laundry or less cooking to do, I don't believe is a deduction legally.

THE COURT: I think to me he is right on this score.

MR. SCHAFFER: No, your Honor. With all due respect, the loss to a wife in the area of household services just as it would be in the area of monetary earnings must be measured as net loss.

THE COURT: Why don't we take the proof and deal with the law issues later.

You may answer.

Q. The question was that your figure not only fails to include the services that Mr. Lavender would have consumed of his own household services but also the share of his wife's household services that he would have consumed.

A. That's correct.

Q. And, therefore, is, in effect, a gross rather than a net figure.

A. That's correct.

MR. SCHAFFER: I have no further questions.

REDIRECT EXAMINATION

BY MR. GINSBERG:

Q. Professor Berenson, just one minor point for clarification and then a major area.

On the minor point concerning a question of whether interest has been added to the earnings over the last two years and some months. Let me make sure I understand that. Let's take the last two months of 1974.

You made a calculation that Mr. Lavender and Mr. Luger both would have earned "X" dollars for those two months. The figure you used in giving us your projections today, is that the same figure or have you added 5 or 6 per cent interest for the last two years?

A. I didn't add any interest to it.

Q. All of the figures you gave are without any interest at all being added in any direct real sense?

A. Very definitely.

Q. Let me, if I may, explore an area which came up at an informal conference rather than what you testified about.

A sum of money awarded to a person in a lawsuit of any type may be invested, may it not, and yield an income to that person, is that correct?

A. Yes.

Q. On the assumption, and perhaps I will round things off a little bit so that the calculations will be easier, the figure that you have projected for the economic loss leaving aside parental care and guidance and a couple of other things, was nine hundred thirty some odd thousand dollars, I believe. It's in the evidence.

Just for the purpose of this hypothetical, I am going to ask you to assume when all the other factors are added, we reach a figure of a million dollars and I am going to ask you to assume an investment rate of 6 per cent which would yield on a million dollars, and I am not talking about attorneys' fees or anything else but on the straight million dollars, would yield $60,000 per year.

A. That's correct.

Q. In terms of Mr. Lavender, if we may stick with him for a moment because that's the case that approaches that figure, in Mr. Lavender's case, could you tell us what his income as of the present time would be if he were alive?

A. I believe it would be $16,619 a year, based on the $7.99 per hour wage at the present time.

Q. Again, only because I don't want to complicate things with the figures, but just to show some principals, I will ask you to use a figure of 16,000 flat rather than the extra amount of hundred dollars.

I think in calculating the fringe benefits, and I'm not talking about vacation pay but the pension and welfare benefits we got a figure of 26 per cent and in calculating the overtime, you arrived at a figure of 24 per cent, so if you add those up that would be an additional 50 per cent over the base income, is that correct so far?

A. Yes.

Q. If my arithmetic is correct, that would give us a present figure as of today, leaving off the hundred dollars, of $24,000 representing base salary, fringe benefits and overtime.

Now, you had indicated that the historical rate of growth since 1968 at the Consolidated Edison Company was 7.1 per cent per year, compounded.

A. Wage growth.

Q. Of course if the wage grows by that amount, then because the overtime and fringe benefits are a percentage of wages, they would be growing at the same rate, is that correct?

A. Sure.

Q. What I would like to ask you to do, if you would, Professor, is to calculate, and again so we don't get confused with too many decimals, instead of 7.1 per cent, just take a 7 per cent increase and I would like to ask you to calculate when it would be that that $24,000 would reach the $60,000 figure that the investment return on a million dollars would bring in at 6 per cent?

MR. SCHAFFER: Your Honor, I would like to object to this testimony.

I don't think we need an expert to do these calculations. Plaintiff's counsel can make the argument in post-trial memorandum.

THE COURT: I sustain that. That's just mathematics.

MR. GINSBERG: It's based on compounding interest tables which I happen not to have.

THE COURT: From that point of view, we will accept it from the papers. In addition to which I am not sure inflation is an allowable factor under the law of the State of New York, but that's another question.

MR. GINSBERG: Your Honor, may I just put in two or three minutes of proof for a couple of figures and then your Honor --

THE COURT: They can be arrived at by you or me or anybody else from an appropriate table. What is the figure in terms of years to reach 60,000 and you can compound 6 per cent interest on 24,000?

MR. GINSBERG: 7 per cent, your Honor.

THE COURT: Yes, and you've got to take 25.8 per cent off the $24,000 before you start on that.

MR. GINSBERG: On the personal consumption. --

THE COURT: Yes.

MR. GINSBERG: Then we would start with the $20,000 figure.

THE COURT: A quarter of the 24, so you're back to 18,000.

MR. GINSBERG: It's a quarter of the original 16, your Honor.

THE WITNESS: That's correct. So we are down to 20,000.

THE COURT: All right.

THE WITNESS: Just using the 7 per cent compound interest table, it takes between sixteen and seventeen years. Roughly I would say sixteen years and three months according to the table.

Q. Just one last question, if I might.

Could you calculate for us again in these round figures, again using the 16,000 base, leaving off the hundred dollars which would be 20,000 after the additions and subtractions, and using that 7 per cent figure rather than 7.1, could you give us at the end of the 32-year work expectancy that is remaining, what the salary plus fringe benefits plus overtime minus personal consumption would have been for Ronald Lavender?

A. Approximately $180,000.

THE COURT: He would be making $180,000 a year?

MR. GINSBERG: That's correct.

THE COURT: In 34 years, he would go from 20 to 180. That's nine times.

THE WITNESS: The compound interest factor is approximately nine.

THE COURT: You are showing me what would happen if you took it that far. That's all you're telling me?

MR. GINSBERG: What we are showing, your Honor, that if the historical progression continues into the future, one adds 7 per cent to a person's income, a Con Ed employee each year. Therefore, this year it would be 7 per cent of 20,000, next year 7 per cent of 20,000 plus that other 7 per cent and on into the future.

THE COURT: What you are saying is, if you had a 7 per cent inflation a year for 34 years, that's where you would get?

MR. GINSBERG: Exactly, your Honor.

THE COURT: If you don't have that, then you don't get there.

MR. GINSBERG: That certainly is true.

BY MR. GINSBERG:

Q. Professor Berenson, I would like to ask your expert opinion on interest rates, since we haven't discussed that.

Could you give us some idea of the history of interest rates over the last 20, 30, 40, 50 years, whatever you feel is appropriate, and let's talk if we may, just -- I don't want to get into paying professional advisers -- but just putting money in Chase Manhattan or a bank that's been around since 1818 or something, putting that money into a savings account, what has been the history of interest rates in bank accounts?

A. Well, they're almost at an all-time high now. They have been going up steadily since World War II, for example. At the present time, you could put money in a savings bank, Dime Savings, Bowery, et cetera, and with complete safety get 5 1/2 per cent from day-of-deposit to day-of-withdrawal type accounts.

Q. What could you get at the end of World War II?

A. My recollection is that it was in the 2 1/2 to 2 3/4 per cent. I'm afraid I don't have any documentation with me but I have seen the figures many times and that's my recollection. In that area.

Q. Professor Berenson, do you have an opinion as a professor in economics and business and the other fields that you spoke of as to whether there is any upward limit on interest? In other words, can you predict the future of interest rates just as we talked about what the salary would be 34 years from now, do you have an opinion as to what interest rates are going to be?

A. Let me say interest rates are not going to keep on going up such as wages at 7 per cent a year because in no time at all we would be paying more in interest than the principal you borrow and that can't be. When you reach a certain point, commerce is going to stop because it would be too expensive for people to borrow money and they will stop borrowing which will drive interest rates down.

The highest in many decade was a couple of years ago, I believe August of '75, when they went up to for even very good grade bonds in the 10 to 12 per cent range. Even the good bonds have gone down 7.8 per cent for Triple A, 7.4 for a long-term treasury bill and 5.5 per cent from day-of-deposit to day-of-withdrawal.

These rates tend to have not a consistent progression such as wages or the cost of milk or bread or butter but a limit bounded by the impact of the high interest rates to stop commerce and cause people to say, it's just too expensive to borrow money, which then, like anything else, becomes surplus, with all that money around, people aren't borrowing and rates come down.

Q. When we walk into the subway now, it cost 50 cents.

Do you recall --

MR. SCHAFFER: Objection.

THE COURT: I recall when it was a nickel. Go on.

Q. Do you recall how long ago it was one-tenth --

THE COURT: 1930.

THE WITNESS: I think as late as '46 or '47.

Q. That would mean if you gave somebody a nickel, they would have to get another 45 cents today --

THE COURT: I really can't --

MR. GINSBERG: All right, I withdraw that.

THE COURT: It depends how much salary they pay and how they are subsidized --

MR. GINSBERG: I agree, your Honor. I will withdraw that.

RECROSS EXAMINATION

BY MR. SCHAFFER:

Q. Dr. Berenson, I want to return to the question I asked of you before, concerning the application of discount rate -- I'm sorry -- the reduction to present value applying a discount rate to today's date as opposed to back to the date of the accident.

I believe you answered on cross examination that you felt the difference was insignificant because it represented only 12-plus per cent of the first two years of earnings.

A. Not to the discount rate. To the interest rate.

Q. I'm sorry, I meant the discount rate.

In effect, by reducing it to present value for this day, using the 6 per cent discount rate, as opposed to reducing it to present value to the date of the accident, assuming there is roughly two years' difference between the two dates, aren't you, in effect, providing for 12 per cent interest on the entire sum of lost earnings as opposed to just the first two years of earnings, as you indicated before?

MR. GINSBERG: I would like to object to that on several grounds, your Honor.

THE COURT: Overruled. Just explore the figures.

A. It's, I believe, improper to take a discount rate to a period that's already expired. You can only discount future sums, not past sums.

Q. The question as to what date should be discounted is a legal matter. It is the Government's contention under the Tort Claims Act there may not be prejudgment interest.

What I am trying to get at is by discounting it today as opposed to discounting it to the date of the accident, aren't you, in effect, applying 12, more than 12 per cent interest to the full sum of lost earnings? That's all I want to know.

MR. GINSBERG: Your Honor, I must object, even assuming and I will not concede that we are not entitled to prejudgment interest. What he is talking about here is a totally different concept and I don't believe any court has ever held that present value should be other than the day of trial.

THE COURT: I think he is asking him a question about dollars. That has nothing to do with legal theories. Maybe he is right on the legal theories.

MR. GINSBERG: Even if he is right, your Honor, I submit he has never suggested this which is something different. He has suggested we are not entitled to prejudgment interest.

THE COURT: He is asking whether he hasn't added 12 per cent all the way up to today by what he has done with his figures.

MR. GINSBERG: Then I have no objection to that question.

MR. SCHAFFER: Your Honor, the question is a little bit different.

It is the Government's contention as we say in our memorandum of law, there may be no prejudgment interest as against the United States under the Federal Tort Claims Act.

What I'm trying to get at is that by reducing to present value as of today, as contrasted to reducing to present value as of the date of the accident, the effect of that calculation is to provide interest from the date of the accident to the present on the entire sum of lost earnings, and that since that is in effect and for all intents and purposes prejudgment interest, Dr. Berenson's figure should be reduced by that amount. Dr. Berenson is obviously not --

THE COURT: We just want to get the fact out.

Q. By reducing it to today's value as opposed to the day of the accident, aren't you in effect providing for an extra 12 per cent interest, not just on the first two years of earnings but on the entire progression of lost earnings?

MR. GINSBERG: Your Honor- --

THE COURT: Let's get answers, please.

A. If you discount for two more periods, two more years, I believe the net effect would be as you suggest, to raise the total by 12 per cent but I answered earlier, twenty minutes -- yes, I believe you are correct.

Q. So your previous answer was in error?

A. Yes, because I guess I misunderstood the question at that time.

Q. You testified before that you obtained the 34 per cent figure for overtime for Mr. Luger by dividing his overtime pay for '73 and '74 by his base pay.

Did you do the same process for Mr. Lavender?

A. Sure.

Q. Did you arrive at 34 per cent for Mr. Lavender as well?

A. No, it was 24 for him.

Q. It was 24 per cent for Mr. Lavender?

A. I believe that was the number, yes.

Q. I would also like to return to the question I asked before about your use of the family size of 2.47 as an average based upon the number of years that the daughter would have been a minor in the family.

It is obviously true, is it not, according to the wage progression you have calculated in the later years of his life, Mr. Lavender would have been earning considerably more than the earlier years? That is correct, is it not?

A. Sure.

Q. It's increasing at 7 per cent a year. And, it would be in his later years that, roughly the second half of his expected work life, that his family would be only two members rather than three, isn't that correct?

A. After sixteen years.

Q. And, therefore, by your applying the average figure across the entire spectrum of his earnings, aren't you really underestimating the total of his personal consumption since it is in his later higher earning years that he will be presumably consuming 50 or more than 50 per cent of the family expenditures?

A. You're making the assumption there would be no savings. You are saying he would consume 50 or more per cent. I suppose the corollary to that assumption, the wife would consume the other 50 per cent and --

Q. I am not making that assumption.

If we went through an analysis that took into account savings, which we have not yet done, you are right, there would be some savings but presumably the overall expenditures are also going to increase, are they not? They're not going to continue to consume to the exact same dollar level and all the rest is going to go to savings, are they?

A. There will be some differences. There is no way of anticipating really whether he would spend more or less on himself as he got older. His interest might change. This is the pattern at this time based upon the average family size at this time. For example, it might be they might have one or two more children which would reduce still further of the portion of the personal --

Q. That is sheer speculation.

We do know for a certainty, though, according to your present calculation, it is the high-earning years when he would have a greater percentage of personal expenditures as a result of the majority of his daughter, isn't that correct?

A. His expenditures might well increase when she leaves the household.

Q. And those are also the years in which his total earnings would also be increasing, or would be greater than the years of his greater minority?

A. I think I see where some confusion may be and if I may resolve it.

Q. I would prefer you just answer my question, if that's all right.

During the years that his daughter is living in the house which would be the years in which his percentage of family consumption would be at the lowest, those are also the years in which his wages will be the lowest, is that correct?

A. The figure I used, not in my computation and that's why I say I must straighten out the confusion, I froze the wages as of the present contract and, therefore, in computing my personal consumption expenditure, I didn't increase his portion or decrease his portion based upon any future wage increases.

Q. Dr. Berenson, did you in arriving at that figure, 25.8 per cent, you simply took the weighted average between a family of two and a family of three, depending how many years the daughter would remain in the family and how many years they would just be a two-person family --

THE COURT: Mr. Schaffer, doesn't all this go to what effect I give to this testimony? Isn't this a matter of argument on your part? We know what he did.

MR. SCHAFFER: All right, your Honor, I won't press it.

Q. In computing the total earnings, Dr. Berenson, you made an assumption of 7 per cent increase in the wages per year. That increase is going to be, at least in part, an inflationary track?

A. In part, yes.

Q. Indeed when you figure the cost of lost household services, I believe you use an inflationary figure of 5.2 per cent.

A. 5.9 per cent.

Q. If we consider or assume that rate of inflation, doesn't it follow that the rate of interest will go out and the discount rate of 6 per cent, if it were to be truly consistent, should be considerably higher to take into account that inflation will necessarily increase interest rates?

A. As I said, there is a limit to how far interest rates are going to go up. I used 6.2, not 6, incidentally. I had to take into account the fact that certain parts of this money must be available for relatively immediate consumption. Therefore, it could not be placed in long-term financial instruments because it has to be used next week, next month and so forth.

Q. But you have testified --

MR. GINSBERG: I think the Doctor was still in the middle of his answer.

A. (Continuing) So that funds set aside for consumption in the near term, invested in instruments which would provide great safety, earn less than 6 per cent, 5 1/2 per cent.

Those funds would could be set aside to provide a return sometime in the future, earn greater than 6 per cent, 6.2 per cent that I used. I used a number in-between to get my 6.2 per cent, balancing the fact some money would be needed soon, some later.

Q. Dr. Berenson, you have testified some ceiling eventually has to be reached as to an economic reality, on interest rates.

Doesn't the same apply to wages? At a certain point, wouldn't labor be so expensive, so that it would be substituted by something else?

A. History is against that. That has not happened.

Q. If you look at wage trend instead of from '68 to '74 as you did, if you go back, say, over the past 50 years, would you find the same 7 per cent figure?

A. No, but I wouldn't find the same 6.2 per cent discount either. It would be much lower. You would be comparing apples and bananas.

As you've been talking, I've been looking for historical -- I don't have a heck of a lot of ancient history but, for example, gross average weekly earnings in 1960 for nongovernmental workers was $80 and some odd cents and in October '76, close to $180. They've gone from 80 to 180 in 16 years, where the base here incidentally is 1967.

Q. You do admit if we went back over 50 years, the historical trend in wages would be lower than 7 per cent?

A. Of course, and so would interest rates.

Q. At the moment I am just asking you about wages.

A. Sure.

Q. You stated history indicates there are no ceilings on wage increases and yet in order to analyze that problem, don't we really have to look at it industry by industry? There are industries where labor has gotten so expensive, they have replaced labor with machines or the industry has really gone into a decline, isn't that true?

A. There are declining industries and obviously there are industries in which machines have replaced labor. It's true, yes.

Q. I guess in a sense my penultimate question for you is:

Do you really anticipate with a reasonable degree of professional certainty, that a utility worker laying cable, 34 years from today, will really be earning $180,000 a year?

A. Including benefits, of course.

Q. And also including deductions for personal expenditures?

A. I'm afraid the answer is yes. I say that because it implies a continuation of the type of economy we are in. We have significant increases each year in the cost of food, clothing, shelter and wages and we have to accommodate to the reality.

Q. If a cable man 34 years from today would be earning $180,000 a year, doesn't it seem more likely we are going to be beaming or electrical impulses off the moon or --

THE COURT: We are going beyond even reasonable speculation I think at this point, Mr. Schaffer.

MR. SCHAFFER: I have no further questions, your Honor.

THE COURT: Do you have any more questions?

MR. GINSBERG: I do, your Honor. Just that interest discount rate.

REDIRECT EXAMINATION

BY MR. GINSBERG:

Q. Dr. Berenson, if you use neither interest nor discount at all, by discount I mean discounting the present value, and you calculatedall of the wages that Mr. Lavender would have earned -- by wages I am including fringe benefits, overtime, minus personal consumption as a net figure -- if you calculated that exact amount today or calculated that exact amount the day after he passed away, and you didn't use any interest or discount factors at all, would those two answers be the same, whether the calculation was today or the day after he died?

A. It would have to be the same.

Q. Have you added one penny of interest to that figure so calculated?

A. No, not as interest.

Q. Rather than adding interest, have you, in fact, discounted that so the answer you gave is now a smaller amount?

A. Sure. I discounted for that 32-year period, sure.

Q. Were you asked to discount it to today?

A. Yes.

Q. Obviously if you had discounted it to 1970, it would be a smaller figure and discounted it to 1960, it might disappear altogether?

MR. SCHAFFER: Objection.

Q. Is this the same as adding interest as making that figure a greater figure?

MR. SCHAFFER: Objection.

I believe we are getting into a legal conclusion as to whether discount amounts, in effect, to prejudgment interest. I don't believe the witness is qualified to answer.

MR. GINSBERG: I think he was asked whether discount and interest is the same by my adversary and I have a right, I think, to explore that on redirect.

THE COURT: Go ahead.

A. You asked me what would happen in 1960. I suggested it might disappear. If you discount far enough, you will discount -- that's how Manhattan Island could have been purchased for just a couple of pennies if you discount far enough back.

Q. As an economic concept, is interest the adding of money to some amount of principal?

A. Interest is the term used for the earning power of money.

Q. Is discounting something different? In other words, is discounting subtracting something from that amount of money?

A. Discounting has to do with the time value of money. They're somewhat related. They're different facets of an overall evaluation of money.

Q. To be very specific, when one adds interest, do you add to principal and when one discounts, do you subtract from principal?

A. Sure. They're opposing in that sense.

Q. To stick to the opposing sense in this particular case as far as your projection is concerned, have you added anything to the principal which would represent the amount of earnings and other economic losses as you have calculated that Mr. Lavender would have earned over his lifetime?

A. I haven't added anything for principal.

MR. GINSBERG: I have no further questions.

THE COURT: Professor, I'm not a statistician and not a mathematician, so perhaps I haven't caught some things.

Let's take for argument's sake your base point that as of today if Mr. Lavender were alive, Mrs. Lavender would be getting $20,000 in income either in cash or services from Consolidated Edison, she and the child: 16,000 roughly, a little more, but 16,000 roughly less the 25 per cent which makes it twelve, plus eight more which brings it to twenty, eight more of fringe. We are talking about $20,000, all right? That's our starting point according to your figures.

THE WITNESS: Approximately.

THE COURT: She should today, if Mr. Lavender were here and not sadly killed in this accident, she would be receiving $20,000 in benefits.

THE WITNESS: Yes, sir.

THE COURT: According to what you get to in these figures, the figure is roughly $1 million and that would earn at 6 per cent $60,000 roughly, today?

THE WITNESS: Yes.

THE COURT: That's three times the actual damage for this year.

THE WITNESS: Right.

THE COURT: I am troubled to where I get by this figure.

If you take -- I am now ruling inflation out of this, the law doesn't permit me to deal with inflation here so I'm ruling it out -- if you take $40,000 excess above the twenty, and you take 32 years of that $40,000, you get to $1,280,000. If you assume that that money is earning interest and that means earning interest over the 32 years on $600,000, roughly, that is another 1,152,000 and if you add the original million and cumulative forties, then the 152, what you have here taking inflation out of this, is that Mrs. Lavender would get $20,000 a year of income and would die worth $3,422,000.

I get 1,152,000, 32 years, 6 per cent interest on $600,000.

THE WITNESS: 2,432,000. Just adding the two numbers you gave us, that is.

THE COURT: Plus the original million which is still there. So you get $3,432,000. She still has $20,000 a year income, am I correct in that?

THE WITNESS: You are correct mathematically. If I may say so, not in reality in terms of what it can buy.

THE COURT: I understand that. Let's turn this around.

What kind of dollars would be giving Mrs. Lavender $20,000 which is your figure, this year? Obviously a third of that, $333,000?

THE WITNESS: Yes, sir.

THE COURT: Thank you very much.

Any further witnesses?

MR. GINSBERG: Plaintiffs rests, your Honor.

THE COURT: Motions to dismiss at this point are denied.

MR. SCHAFFER: There is none, your Honor. We have conceded liability.

THE COURT: Shall we take a ten-minute break.

You have one witness?

MR. SCHAFFER: Yes, your Honor.

THE COURT: Can we conclude here four thirtyish do you think?

MR. SCHAFFER: That would depend on Mr. Ginsberg's cross examination.

THE COURT: We will take a brief recess.

(Recess.)

MR. SCHAFFER: Defendant calls Thomas Fitzgerald.

THOMAS KEVIN FITZGERALD,

called as a witness by the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SCHAFFER:

Q. Dr. Fitzgerald, what is your profession?

A. I'm a consulting economist with National Economics Research Associates in New York.

Q. How long have you worked for that association?

A. I've worked for them for approximately fifteen months.

Q. Could you describe the nature of their work?

A. It's a group of consulting economists who deal, I would say, primarily in areas of antitrust and utility economists, regulatory utility economists. Also sections that deal with environmental economics and sundry other areas such as what we are presently engaged in.

Q. That is personal injury?

A. That's right.

Q. What is your academic background?

A. I have a Bachelor's Degree in economics from Boston College and a Ph.D in economics from Rutgers University.

Q. After receiving your Ph.D, did you have occasion to teach economics?

A. I've taught economics both before and after receiving my Ph.D. I have taught economics at Rutgers University, Western Kentucky University and Fordham University.

Q. And in your teaching experience, what are some of the courses that you taught?

A. I have taught courses in micro economics, public finance, labor economics, statistics, mathematical economics. I think I mentioned public finance. That pretty well summarizes it. I'm a member of the American Economic Association.

Q. In the course of your career as an economist, have you had occasion to do evaluations of damages in personal injury or death cases?

A. Yes, I have.

Q. Approximately how many such estimates have you done?

A. I have probably done estimates in the vicinity of twelve to fifteen, maybe even more. However, I have testified in fewer cases than that.

MR. SCHAFFER: At this time, your Honor, in order to save time, I would like to request a stipulation from plaintiff's counsel that Dr. Fitzgerald is qualified to testify as an expert witness on --

THE COURT: Is there any question about that?

MR. GINSBERG: I haven't objected to a question, your Honor.

THE COURT: Then we'll go ahead on the theory he is.

Q. Dr. Fitzgerald, at my request, did you make an evaluation of the value of lost earnings to Mrs. Lavender arising out of the death of her husband in the accident which is the subject matter of this lawsuit?

A. Yes, I did.

Q. And before going into the specifics of that evaluation, let's see if we can make clear at the outset what is not included.

I didn't request you to make an evaluation of the value of the conscious pain and suffering of the decedent, did I?

A. No, you didn't.

Q. I didn't ask you to make an evaluation of the value of the loss of parental care and guidance to the minor child?

A. No, you didn't.

Q. Furthermore, the figure which we are about to discuss, at least at the outset, will not include the value of fringe benefits such as pension or medical benefits, will it?

A. No, it will not.

Q. And that figure also will exclude the value of household services that were lost to Mrs. Lavender, is that correct?

A. Presuming there are such losses, that's correct.

Q. So then we are simply involved in the loss of monetary contribution as the result of the death of her husband and, therefore, the lack of any salary contribution to the household expenses.

A. Correct.

Q. As a result of the estimate you did on this subject matter, have you reached a conclusion which in your opinion, and within a reasonable degree of certainty for an economist, represents the losses to Carol Lavender from her husband's death?

A. As to the earnings that you have carefully stipulated, I have reached such an estimate.

Q. Can you give me the sum that you have reached?

A. The sum that I have obtained discounted at a 5 per cent rate, as of let us say January 1, 1974, which is roughly the time of the accident, is $287,029.14.

Q. Dr. Fitzgerald, let's start at the beginning.

Could you describe the process by which you obtained that result?

A. I'll go through each item and if you care to stop me, go right ahead.

The first thing that has to be considered is the family size. There was, prior to the accident, Mr. Lavender, Mrs. Lavender and a child. We have assumed that the child will leave the family after completing, let's say upon the date of the 22nd birthday is the easiest way, I guess, of saying it.

As far as income projections are concerned, we did the following: We took the 1974 income which was presumed to be for ten months of the year 1974 through October 31, expanded that out to a full year or annualized it to a full year's income. We then used the union contract to grow that income out through 1976, according to the scheduled pay increments. I'm not sure what the terminology that has been used in this testimony is. We are talking about the schedule pay increases according to the union contract.

Following that, we assumed a 7 per cent growth in that estimate for 1976. So we have the 1974 estimate which is based primarily upon Mr. Lavender's earnings for that period. They have been expanded through '75 and '76 using the scheduled pay increases of the union. They have then been grown out beyond that at a compound annual growth factor of 7 per cent.

That was based upon the Bureau of Labor Statistics industry wage survey of electric and gas utilities for maintenance mechanics in the Middle Atlantic area, straight-time pay between 1967 and 1972. That 7 per cent is actually slightly higher than the observed per annum growth rate in straight-time hourly pay.

As for the length of the earnings stream considered, we assumed that Mr. Lavender, upon his 63rd birthday would have retired from the job at Con Edison, and that actually involves 35 full years of earnings starting with January 1, 1975. This is based essentially on the same type of data that my predecessor on the stand used, two articles in the Monthly Labor Review. So, with those particular items and those assumptions, we have then an earnings stream, projected earnings stream through the anticipated work life of the decedent.

Q. Let me ask you, up until this point your assumptions have not differed in any material aspect from those of Dr. Berenson, have they?

A. Only to the extent that I didn't deal with the within rank increments in pay. In other words, I didn't deal with the going from the minimum to the maximum

Q. You assumed the maximum, did you not?

A. No, I didn't. I assume what was being paid as of 1974 and again escalated that according to the contractual increases in the collective bargaining contract and then drew that from 1976 at 7 per cent growth rate.

THE COURT: You added the 7 per cent factor for 34 years?

THE WITNESS: I wouldn't say 34 years. Starting with projected salary for 1976 that figure was then grown out at a compound annual rate of 7 per cent which would be, in fact, 33 years at 7 per cent. Prior to that, it was higher than 7 per cent.

THE COURT: You applied the 7 per cent all the way to the end of the period?

THE WITNESS: That's right.

A. (Continuing.) With the earnings stream, the objective I had in mind was to estimate what was actually foregone by the survivors of the decedent. That is, essentially what part of those earnings would the survivors in the absence of this event receive, and attempted to estimate that. That is what I would refer to as the foregone earnings.

The first item which has to be deducted from this earnings stream, in my view at least, is income taxes. That includes federal income taxes as well as state and local income taxes. Mr. Lavender, according to my record, --

MR. GINSBERG: Your Honor, I must apologize for interrupting but since we are not on a question and answer, that's the only way I can.

I will object to any testimony concerning deductions for any income taxes. I have a case by Judge Cannella in which he handled this problem --

THE COURT: Why don't we take the testimony and deal with that accordingly. Your objection is noted.

A. (Continuing.) Mr. Lavender happened to be a resident of New York City, and according to both New York State tax and New York City income taxes, I'm sure that most of us are well aware it happens to be a fairly high tax area and, of course, we are all familiar with the federal income tax.

In taking out federal income taxes, we assume that, and this applies as well as to state taxes, essentially our approach was as follows: To, first of all, account for the proper exemptions given the size of the family and again assuming the child leaves the family after reaching age 22, and then to calculate deductions on the basis of the percentage of adjusted gross income in federal tax returns that is deducted, both in itemized deduction returns as well as standard deduction returns. The two percentages within average, using a fairly familiar statistical method of weighted average, weighting the percentages by proportion of total returns, filing standard and itemized deductions --

Q. Excuse me, where did you get the percentages from?

A. By the publication, Statistics of Income, and the year happened to be 1972, the latest available to me at the time, Individual Income Tax Returns is the subtitle of that publication, from the Internal Revenue Service.

That gave us a proportion of adjusted gross income claimed as deductions and we combined the deductions, exemptions and took that from the projected earnings and then obtained the figure that is referred to in tax returns as taxable income; using the Schedule Y-1040 for married couples filing joint returns, we were able to calculate a tax liability on the basis of present rate structure.

I might add, although we used 1972 data, these data were adjusted upward to take into account changes in the tax law with respect to deductions and tax credits in the intervening period between 1972 and 1976 or '75, when the earnings stream begins.

A similar procedure was adopted for city and state taxes. However, we, instead of going through a detailed step-by-step measurement of what deductions would be, we simply assumed deductions would be $3,000 per year, which is slightly higher than the standard deduction, but one must assume, at least I think there is a basis for presuming that the biggest item for non-homeowning New York State, city residents is probably their taxes to the state and city, the biggest deduction on the federal return but not a deduction on the state or local return. So that I felt at least that a $3,000 across-the-board deduction was at least in the early years generous and probably in the later years quite reasonable.

I should also add that in the case of the federal tax deduction proportions that were used for taxable income, computed taxable income in excess of $30,000, we assumed the proportion of a GI deducted by people filing itemized returns only since at that point to be consistent, the state and city tax would be sufficient to exceed the standard deduction in the federal tax returns, so that that would make that consistent. We no longer considered a weighted average of itemized and standard deduction returns.

Given, on the basis of the income stream a year-by-year of what the state and city tax liabilities would be, we netted the tax liabilities from the projected earnings. The resulting sum is what economists often refer to as disposable income.

The disposable income is generally divided into two components: consumption and savings. In order to make this division, we appealed to the Bureau of Labor Statistics Consumption Expenditures and Income Study, published in 1966, from which we determined, according to different characteristics of income earners, what proportion of money income after taxes is allocated to current consumption expenditures as defined in gifts and contributions. That figure is a variable or that proportion is a variable figure depending upon the characteristics of the family in question. And, we made an effort to tailor to the degree possible the Lavender family characteristics to those particular group characteristics that exist in these Bureau of Labor Statistics tables.

Q. Can you just briefly describe what the characteristics are?

A. Well, for instance, one characteristic clearly is through the first 20 years of the analysis, we are dealing with a family of three people.

Secondly, we have an approximation of what average income would be. Some of the tables are listed according to size of family by income and so we would place the family in the particular income bracket for families of three. We would then see if the number of children in the family under eighteen corresponded with what we had; whether the average head of the family corresponded with what we had and tried to match within the bounds of possibility really, since clearly it's impossible to get a perfect match, the Lavender family at different points in time with the average family composition that we had in these tables.

I might add, and I think it's perhaps an aside but nevertheless significant, of course these tables represent income levels from the 1960 period and, therefore, we have to take the 1974 income that we had projected for Mr. Lavender and in a sense adjust it downward, scale it downward to make it commensurate with income levels in the early 1960's.

The proportion of total income after taxes consumed, we assumed to remain constant. Overtime, in effect, for people in a specific income bracket, the term used here is relative income, which essentially says if you're in a particular place in the income strata and you consume, let's say, 90 per cent of your income if everyone's income increases roughly at some rates overtime, you will be still in the same relative position in the income strata and it is reasonable to assume you will be consuming 90 per cent.

We have a basis for dividing after tax income between consumption and savings. We applied the proportion we just mentioned to the income stream and we get consumption, the residual we refer to as savings. Savings go completely to the survivors of the decedent. We are not assuming Mr. Lavender had any share of the savings. The full savings are transferred or become part, you might say, of the estate of Mr. Lavender.

The consumption expenditures, however, we assumed a portion of those consumption expenditures would have been consumed by Mr. Lavender and the proportion of those consumption expenditures is based upon another Bureau of Labor Statistics study entitled, Revised Equivalency Scale for Estimating Equivalent Incomes or Budget Costs by Family Type.

Q. Dr. Fitzgerald, that figure is what Dr Berenson was referring to before as the deduction for personal expenditures of the decedent?

A. Right. Basically -- no, not quite.

This figure we obtained will be multiplied times what I have called this proportion of money income after taxes that is consumed. Those two proportions are multiplied together to get the figure essentially that Dr. Berenson was referring to.

Basically what this latter figure does, it tells us for families of different characteristics, what percentage of the total budget one family would have to have, to have a standard of living equivalent to some base or bench mark family.

Q. In other words, what you are basically computing is what level of income, to make it specific to this case, what level of income Mrs. Lavender and her child would have to have in order to provide them with the same standard of living that they had when Mr. Lavender was a member of the family.

A. That's correct. Income, no, consumption expenditures, yes.

Q. You are leaving the savings aside and letting them accumulate without this reduction?

A. Precisely.

Again, basically what we are saying, for instance if the bench mark family happens to be a family of four with two children, and some other characteristics aside, if we assume they require a hundred dollars to assume some standard of living, then a family of two children and only one adult may require $75 to obtain the same standard of living and we would, therefore, in this comparison we are taking away one adult and we are really saying the marginal consumption expenditures of that one adult is $25 or 25 per cent of the total budget.

Again, these proportions were also calculated on the basis of the characteristics of the family as it changes through time, as the age of the head changes and the age of the child in this case changes, we get different proportions.

Now, contrary to Dr. Berenson's approach, this approach allows for that proportion which represents the proportion of consumption expenditures which represents the decedent's consumption to change over time according to changes in family characteristics.

Of course it allows such things as the husband's share of consumption to increase as the child leaves the family, and the age composition of the remaining family, husband and wife increases or ages.

Perhaps, if I can give examples of some of the percentages that were employed.

Q. I think perhaps the best thing to do along those lines is to go through the end and if Mr. Ginsberg has questions for you on cross examination, he can bring that out.

In any event, we have gotten now from the point which you have taken gross income, you have adjusted for taxes, divided between consumption and savings, leaving savings aside for a moment, you then applied to consumption a percentage to take into account the personal consumption expenditures of the decedent and that's where we are now.

A. We have now left a savings stream and consumption expenditures of the survivors remaining.

Now, these two streams are subsequently adjusted -- let me take that back. The consumption stream, that is the family consumption expenditures, -- strike that again and go back to my original statement.

Noting that the savings stream has been put to the side and we have not considered the husband's share of savings, the savings remain intact, it has been only the consumption stream to take out the husband's consumption, now we have adjusted those two streams for the survival probability of the husband.

Q. Would you explain that in more detail. We have heard testimony about life expectancy and you are now using a concept called survival probability.

Would you explain how those two concepts differ?

A. Well, expected life span is not completely separate but it is essentially an average of the remaining years of life of those people who are in the population at any given time. If we have a 27-year old male, a white male, if you want to be that specific, there exist at any point in time a whole age spectrum of white males and on the basis of those surviving white males, it's possible to calculate for a 27-year old white male what on average remaining years of life that individual can expect.

Of course, it's understood that there are a number of white males who will die much earlier than that life expectancy as there are a number who will live quite far beyond that life expectancy.

Q. In comparison to that average, what is the survival probability that you have just referred to?

A. The survival probability is based upon the following: It takes again the age composition -- strike that.

It is based upon the same source Dr. Berenson was using, the Public Health Service, Vital Statistics, the United States. It is listed out of 100,000 babies born alive, by sex and race, at different ages, how many survive. If, for instance, we have an individual who is alive at age 28, that is a certain event. We know that individual is alive. He is a survivor. Now, out of his cohort, let's say, in the subsequent year, a certain number of them will die off and there is then a smaller number of survivors.

Q. Then the survivor probability rate will be the statistical probability of surviving one more year?

A. In the case of a 28-year-old man, you take the number -- the way in which it is calculated, you take the number of survivors, one out of 100,000 born alive, the number of survivors who are 29 and divide by the number who are 28. That gives you the probability essentially, an estimated probability of the survival of a 28-year-old man to his 29th birthday.

If you want to find out what the probability of him surviving to his 30th birthday is, you take the number of survivors who are 30 out of 100,000 born alive and divide that into the number of survivors aged 28 and so on and you can get successive probabilities making it to successive birthdays.

Q. With these survival probabilities, how did you apply them to the consumption expenditure stream that you referred to before?

A. Consumption and savings they were simply multiplied in each year by the respective survival probability for that year.

Q. Putting this in layman's terms, in other words what you're doing is each year you are discounting for that relatively small probability, at least in the younger years that the individual would not survive the successive year?

A. Correct. In other words, to take Dr. Berenson's approach again and assume that the individual were to live his full expected life, well, the earnings are in that case viewed as occurring with certainty since the individual is assumed to live his full expected life. The survival probability implicit in that argument is one; the individual is certain to survive, an event which has a probable of one is an event which occurs with certainty.

In our approach, however, the survival even to next year is not a certain event. There is a probability based upon the vital statistics of about 99 per cent. So, we would adjust next year's earnings by .99 to bring it down to what we could expect the individual to earn, taking into consideration survival prospects.

Q. Once you have applied the survival probability to every single year of the work life of Mr. Lavender, how does that give you a result, or why would that give you a result in any way different from assuming as Dr. Berenson did that the life expectancy will be the average life expectancy?

A. As far as earnings, at least the answer there is obvious. What I have said is that if we take work-life expectancy, in this case -- I'm sorry, if we take life expectancy in this case, the life expectancy goes beyond the work-life expectancy. He is assumed to retire at 62 or 63, assumed to have lived until 70, let's say. Each one of those earnings years then is assumed to occur, using that approach, with certainty.

The probability that's associated with the survival through that year and the earning of that amount of income is one. In my approach, it's .99 in the first year, it goes down to .98, but it continues to decrease. Each year the earnings stream is adjusted by a probability value which is less. Clearly then --

THE COURT: Mr. Fitzgerald, if I can inject myself so I understand it, what you are actually going to end up doing then is, you get to the point where you are even allowing a certain small percentage for much older years. Anybody that has reached 81 has a certain chance of reaching 82 but I take it you cut off the earnings at a certain point.

THE WITNESS: That's right, at 63.

THE COURT: I understand your theory. You'll have to tell me why I should apply this theory rather than any other theory at a later point.

MR. SCHAFFER: It's a question of which is more --

THE WITNESS: I am simply providing this evidence, your Honor, as a system which for projected earnings stream tend to be somewhat more accurate than just using average life expectancy.

THE COURT: You are saying that in the 55th year of life, assuming he has a 60 per cent --

THE WITNESS: As an example. It would be higher than that.

Q. Could you refer to an example?

A. Well, the 55th year, talking about a white male, we have assumed attained the 28th birthday although it is slightly short of the mark higher. Then the probability of that individual reaching age 55 is .867, which is essentially 86.7 per cent of the 28 years old make it to 55.

THE COURT: You don't do it from year to year then.

THE WITNESS: No.

THE COURT: What you are doing is, you are taking 86 per cent of his earnings for the 55th year rather than all of them.

THE WITNESS: Exactly. I think the rationale here essentially is -- the other approach has more compelling value if it were the case that individuals always work until the day they die.

Q. In other words, the average system tends to place disproportion of weight on the earning years and underemphasize the post-retirement years whereas yours tries to correct for that?

A. Yes.

MR. GINSBERG: Your Honor, I would request counsel stop leading quite so much.

THE COURT: The whole point is that I understand and I've been made to understand.

Let's go ahead.

Q. Let's go forward from the application of the survival probability percentage.

What was done next?

A. The next step is the discount rate which Dr. Berenson explained I think in lucid terms, why we use it and why we discount the present value. I should explain that Dr. Berenson has used a 6.2 per cent discount rate, and you, therefore, might be surprised that I'm only using a 5 per cent discount rate. However, there is a logical and conceptionally consistent reason for that and the reason is I have taken taxes out of the numerator of this calculation and if I'm going to take taxes out, I have to adjust the denominator where the discount rate appears in order so that I have something approximating a net rate of tax interest.

Q. In other words, the 5 per cent rate of interest you are assuming is the rate of interest one could obtain after having paid taxes on the interest?

A. Essentially, yes. In the income brackets that we are talking about. Basically the rationale, the exact discount rate is always open to question and argument but I am using this as a rate which I think is currently prevalent in markets on tax-free state and local bonds. One can find 5 per cent rates of interest which would give you some idea what a net of tax interest rate might be. There may be some that are higher.

Q. In this day and age, are you talking about relatively high quality state and local bonds?

A. Yes. I think you can probably get higher rate on Big Mac Bonds.

Q. If this Court were to hold that the deductions for taxes which you previously indicated should not have been made, would the discount rate then to be applied at the end, at the point which you have just reached, would that have to be higher to reflect a gross interest rate as opposed to a net rate after taxes?

A. There is no question about the fact that it would have to be a gross rate of interest.

Q. In your opinion, if we were to apply a gross rate of interest for our discount figure, what should the discount be?

A. I don't think I could answer what it should be.

Q. What would be, in your opinion as an economist, an appropriate discount rate if we were concerned with the gross rate of interest as opposed to the net rate of interest?

A. Well, I think that one could probably deal in anything as high as 8 per cent possibly, but possibly lower. I think Dr. Berenson, who is, I am sure, more of an expert on market interests than I, mentioned I think a figure of 7 1/2 per cent, at least currently being earned on high-quality corporate bonds which it seems to me would be a reasonable form of investment for an award of this nature.

Q. We have now reached the point where you have taken this earnings stream as reduced by taxes, personal consumption percentage and survival probability and you apply to it a 5 per cent rate of discount.

Is there anything further in your calculation?

A. That is the full extent of my calculations on foregoing earnings.

Q. Turning to two matters which have been so far excluded from your calculations, the first was fringe benefits which would include health and pension plans. I believe you have heard the testimony of a representative of Consolidated Edison that in his experience, the fringe benefits that would be lost to the survivors of a Con Ed worker were approximately 26 per cent of the base pay, not including overtime.

Now, that would figure as approximately what percentage of total pay if we include overtime?

A. 26 per cent?

Q. If we assume with Dr. Berenson that overtime is somewhere between 24 and 34 per cent of the base pay, let's take a 30 per cent figure, that overtime is 30 per cent of base pay, if the fringe benefits were valued at 26 per cent of base pay, then what per cent would they be of base pay plus overtime?

MR. GINSBERG: Your Honor, I would like to object to that because the fringe benefits, I think, were not used in the Luger case where he didn't have a wife, where there was a 34 per cent, so I think the only figure we can use is the 24 per cent which is the figure in the Lavender case used by Dr. Berenson. I don't think we can average them out because in the Luger case we didn't consider fringe benefits.

MR. SCHAFFER: Your Honor, we are dealing with such a very small sample year, one and a half years and to reduce the sample further for the last ten months of one individual's life, and assuming that's going to be the percentage of overtime always, may make our result even more out of touch with what the real world is.

THE COURT: I'm not quite sure I understand.

MR. SCHAFFER: We have no reason for thinking over an extended period of time the overtime as a percentage of gross pay would be significantly different for these two individuals. Indeed when I asked Dr. Berenson can it be assumed an older individual will be earning less overtime because of his age and commitment to his family life, he replied not at all, he might have more overtime because he's trying to support a bigger family.

So the fact one moment in time Mr. Luger this

34 per cent overtime and Mr. Lavender 24 per cent, I don't think that necessarily requires us to only consider, even though we are talking now about Mr. Lavender, the 24 per cent.

THE COURT: This can be argued in terms of how to deal with these figures and not necessarily make this testimony excludable.

Go ahead.

Q. In any event, for purposes of figuring the addition that should be made for fringe benefits, the figure that you have provided of lost contribution does include an overtime aspect, does it not?

A. Yes, it does.

Q. Turning from the fringe benefits to household services, --

THE COURT: There is something I'm curious about here. You gave me a figure of $287,000. These deductions are deductions from that, as I understand it.

MR. SCHAFFER: That's the net figure.

THE COURT: That's the net figure, and this is how you got to that?

MR. SCHAFFER: That's right. I thought we would start with what the bottom line was so we knew where we were going.

THE COURT: All right, very good.

Q. In respect to these calculations, are the results year by year for each element of deduction, are those contained on computer readout that you have brought with you today?

A. No, they're not. They're contained to the extent that they're implicit. The federal tax deduction is contained in the computer printout. The state and local tax deduction, however, can be determined by making some simple calculations with the date that it's available in the printout.

MR. SCHAFFER: I was thinking, your Honor, of the possibility of offering it into evidence but if it is not complete, we better avoid the confusion.

THE COURT: Did you do a figure of the gross discount rate for 7 or 7 1/2?

THE WITNESS: No, I didn't.

THE COURT: How does one do that?

THE WITNESS: Well, it seems to me the choice of discount rate in terms, among other things, you might say what sort of implicit assumptions are made about underlying rates of inflation as well as the question of income tax.

THE COURT: Just hold on. You said when you got down to the bottom you applied a discount rate of five and that got you to 287.

If you applied a discount rate of, let's say, 7 1/2, could you tell me --

THE WITNESS: I couldn't do it offhand. I could just give you --

THE COURT: What figure did you have before you applied the five to?

MR. SCHAFFER: Maybe we should go through a number of those steps.

THE COURT: This is just --

THE WITNESS: It's simple formula, just plugging in a different value.

Q. His Honor has asked before you got to 287, to what number did you apply your 5 per cent discount rate? Do you have that on the computer printout?

A. Yes, I do.

Q. After taking into account all the steps you described except the last step, what number did you have?

A. You want to know what the totals are?

Q. Just the --

A. The year-by-year numbers?

Q. The total for the entire lifetime just before applying the 5 per cent discount rate.

MR. GINSBERG: He may have discounted year by year and not have a total.

A. I have a total for -- no, I don't have any totals. Excuse me, I do, I'm sorry.

The savings figure in total is $76,508, rounded to the nearest dollar. That was the total undiscounted.

Q. Savings?

A. Savings.

The total undiscounted foregone consumption expenditures, is $658,350 rounded off again to the nearest dollar. Those are the totals undiscounted.

Q. If you had those two --

A. I should point out those were not adjusted back to the date of the accident or thereabouts. In other words, the present value that I have given you at the outset was discounted to January 1, 1975 as I was requested to do.

Q. In other words, if you add these two figures that you have just given to the Court, and apply 5 per cent discount rate to them, back to January 1, 1975, you will get your $287,000 figure?

A. That's right.

Q. If you want to know what figure you would get if you applied a different discount rate, you would go to discount tables and apply the proper number in a discount table, assuming 7, 7 1/2 per cent interest to that number over the period of years involved?

A. No, no. It's not applied to that number. It's applied to the individual elements to give you that number.

Q. With respect to household services, that is, the value of foregone household services by Mr. Lavender, you didn't make any estimate, did you?

A. No, I didn't.

Q. Can you just describe briefly in general terms -- what the factors would have to be or what the data would have to be in order to make such an estimate?

A. The usual approach that's taken to such estimates, is to get some estimate of how many hours are spent in the household by an individual or how many hours are spent performing different functions in the household and then those hours are valued according to some type of market wage for performance of those specific types of services.

Q. And then thereafter is a computation done to net that figure in terms of what might be saved by the absence of that individual in terms of household work?

A. Well, I personally think that that's the proper procedure. That's the proper way of going about it. I think the available data certainly suggests in the case of households where there is one breadwinner, so to speak, and the other person stays at ~~home,~~ that the services provided by the person who stays at home, are substantially higher than those provided by the individual that goes out to work.

And, in general, I think it's reasonable to argue that all but the primary home person, if I can use that expression, are net consumers of household services. That is, essentially they use up more of the services that are produced by the other members of the household and by themselves than what they contribute to the household, except in the case of services which are of a certain irreplaceable nature.

If there is some service, for instance, that the husband provides that because of biological conditions the wife cannot provide, such as involving heavy lifting or something of that sort, then obviously in that case, in the absence of the husband, the wife would have to have somebody else coming in and do it and, in that case, I would say there is an argument for considering the value of those services, although what fraction of services provided by any individual, those services that I consider appropriate, what fraction is involved, I have no way really of judging. It would be purely arbitrary to put a number on that.

Q. Do I understand correctly what that means then, except for those services, the services lost to a wife where a husband who was the breadwinner dies, are offset by less work for her to have to do around the house?

A. Essentially, right.

MR. SCHAFFER: Thank you. I have no further questions.

THE COURT: We will recess until the morning. We will recess until 10 o'clock in the morning.

(At 4:45 p.m., an adjournment was taken to Thursday, January 20, 1977, at 10:00 a.m.)

CAROL LAVENDER, etc. et al.

- against -

75 Civ. 3520
(RO)

UNITED STATES OF AMERICA.

New York, New York
January 20, 1977, 10:00 a.m.

(Trial resumed.)

(In open court.)

THOMAS FITZGERALD, resumed:

THE COURT: Proceed.

CROSS-EXAMINATION

BY MR. GINSBERG:

Q Mr. Fitzgerald, can you tell us, if you know, how the United States Attorney's office happened to pick you or happened to come in contact with you?

MR. SCHAFFER: Objection.

THE COURT: Overruled.

A I can't be quite sure on that. All I know is that one day I received a call from a senior consultant in our office who had asked if we do any work of this nature, that she had through a friend been in contact or been contacted by Mr. Schaffer concerning an evaluation of this nature.

I responded that I did. She gave me his name and I returned the call.

Q And so I take it that as far as you personally are concerned, this is the first time you have ever had any dealings with the United States Attorney's office?

A That's correct.

Q Now, you had mentioned something about 12 to 15 cases that you had consulted on as far as litigation was concerned.

A That is correct.

Q And those would be occasions where you personally were involved or where your organization was involved?

A Where I personally was involved.

Q And would these be occasions where you would be asked either for a plaintiff's attorney or a defendant's attorney or insurance carrier to prepare a projection?

A It so happens that all of the cases have involved the defendant's attorney.

Q And over how many years, Mr. Fitzgerald, have you done this?

A Well, I have been with the firm for 15 months and it has been approximately one year's time, over which time I have been involved in cases of this nature.

Q So in a one-year period is when you handled these 12 to 15 cases?

A That is approximately correct.

Q And always for the defendant?

A That is correct.

Q And as far as your firm is concerned -- when I say your firm, I don't mean you own it but the firm you are connected with -- is there anybody else connected with your organization who is involved in litigation?

A Litigation of this nature or just litigation in general?

Q Litigation involving a claim where somebody has been killed or injured in an accident.

A There are others who are involved. First of all, people who assist me; secondly, my immediate supervisor has on occasion become involved in cases of this nature. There is at least one other vice-president, if I'm not mistaken, in the firm who deals with cases of this nature.

Q Now, when you are talking about your supervisor, do you mean that he deals with those same cases that you do or he has other cases besides the ones you deal with?

A I would say generally speaking the same cases that I deal with.

Q And, of course, the people who work under you have the same cases.

A Correct.

Q So that the only other person who handles different cases is that vice-president you mentioned?

A Yes.

Q How large an organization is the National Economic Research Associates?

A I would be hard pressed to give you an exact number, but I would say in the vicinity of 200 might be a reasonable approximation.

Q And these cases that you personally have handled, are these cases that came directly to you or are these cases that came to the associates and they assigned them to you as sort of your sub-specialty?

A I would say initially they were assigned to me, but I have, you might say, taken over the function in our New York office.

Q How many people are in your New York office? I'm not talking about secretaries.

THE COURT: Where does this lead to?

MR. GINSBERG: I'll leave that.

Q Now, Mr. Fitzgerald, in your testimony you ended up really giving us only one figure, and that was, I think, the bottom line figure, as Mr. Schaffer put it, which I think is a good description. And I would like to start from the beginning, if I may, and go through some of your assumptions and calculations.

Before I do, let me ask, do you have any written -- did you submit any written report to Mr. Schaffer or the U. S. Attorney's office?

A No, I did not.

Q Do you have in handwritten form with you today on a calculated basis a report that one could really follow through step by step and get the numbers that you come up with?

A I have only my notes and my computer printout.

Q And without you to interpret those notes and computer printout, if somebody were just to walk into the courtroom, could the person pick up those papers and decipher them or would you have to explain them?

A I would say someone coming in off the street might have to have it explained to them. Those who have heard the testimony might be able, with some effort, to put it together in a piece-by-piece fashion.

Q Could I ask if I could see at least the major part of these calculations you have done?

THE WITNESS: Is there any problem with that?

THE COURT: No.

MR. SCHAFFER: Your Honor, I would like to object at this time. Pursuant to pretrial conference before

Magistrate Schreiber, it was initially agreed that counsels for plaintiffs and defendant would exchange written reports prior to the date of trial.

Several weeks ago I informed Mr. Cy Diamond, who was the previous attorney, from Fuchsberg, handling this case, that I did not believe my expert was going to have the time to prepare a written report.

I understand from him that his expert had prepared a written report and we agreed that in all fairness he need not give me his expert's written report in advance because mine had none, and that at that point it was also agreed there would be no exchange of written materials in advance of trial.

I think --

THE COURT: How does that apply to cross-examination, testing the basis for the report or for the testimony we have heard?

MR. SCHAFFER: It was, I bleieve, our understanding that would also apply at trial and that we would cross-examine based upon the direct testimony.

It was with that understanding in mind that I have not made the similar request of Dr. Berenson when he was here because of this conversation which I thought was this agreement.

THE COURT: I don't want to prejudice you at all. Let's put it this way: If you had asked me whether that would have held at trial, I would have said absolutely not because on trial you can cross-examine using any tools of cross-examination that are available.

I don't think you were disadvantaged because I though you cross-examined fully on the basis of Mr. Berenson's figures, and I think in this case I will permit him to be cross-examined with these notes.

MR. GINSBERG: May I just respond to one thing?

THE COURT: You don't need to. Let's go forward, please.

MR. GINSBERG: There is a statement which I think cast some questions about our integrity.

THE COURT: I don't think there are any questions casting doubt on anybody's integrity. I want to keep going with the merits and I don't want to get us sidetracked.

Let's go ahead.

(Pause.)

MR. SCHAFFER: If you are going to explain what these documents are, as you give it to counsel, do it on the record.

THE COURT: Give Mr. Ginsberg the papers and he will put a new question to you.

Q May I ask you one thing which might save me a minute.

Are any of the computer printouts copies of other ones or are they different?

A No, no. There are two sets of estimates made, one at a discount rate of five per cent and the other at a discount rate of 5.5 per cent.

The sequence involves, first of all, laying out the basic undiscounted, unadjusted values, and then adjusting them, first providing the present values and then adjusting them for your survival probability and what I have called family share of consumptions expenditures. So there should be seven sheets all together there.

Q Now, Mr. Fitzgerald, first if we may go to the assumptions. Before Mr. Schaffer questioned you, he made it clear, and fairly so, that certain items were excluded from your consideration. Among those, of course, were the non-economic items, of loss of consortium, pain and suffering and parental care and guidance.

In addition to that, I believe that certain economic items were also excluded. If I may ask, what they were and maybe I will just name them.

As far as fringe benefits are concerned, overtime pay, promotions, were any of these things considered in your calculations, and if so, which ones?

A There was no consideration of fringe benefits. The question of over-time pay versus promotion pay, well, the projections were based upon Mr. Lavender's 1974 income, annualized from a 10-month period to a 12-month period. That clearly took into account his present level in the company at that time. This was the rate that was increased. I mean this was the rate of pay or the annual rate of income that was increased, first according to the union contract increments, and then according to the seven per cent.

Now, you can look at it one way or the other way. If we take that as our basis, it includes his overtime pay and, therefore, we are assuming that constant proportion of total income represented by overtime and we are growing that out at some constant rate.

So the earnings stream then includes overtime pay. It does not, however, include promotions as calculated. However, one can also look upon it differently as in some sense compensating for promotions and the amount then of overtime would diminish as we went through time.

I might also point out that it is not clear that an increment of seven per cent does not include an allowance for promotional increment, allowing no merit whatsoever. This is a rate I chose which represented something slightly higher than what the rate of increase in straight time pay for gas and electric utility workers had been over a period from 1967 to 1972.

The possibility --

Q If I may, and I don't mean to interrupt you, but I think I asked a question and now you have gotten into other areas because I really want to take these things one at a time, if I may.

Let me just stay with the overtime for a minute.

Now, the evidence which has been introduced, and I want to see if I understand what you did. The evidence that was introduced indicated that with overtime for the 10 months of 1974, Mr. Lavender earned $12,314, and some change.

Now, is that the figure that you started with?

A That's the figure that I started with. I assume that was for 10 months of work.

Q And then when you say you annualized it, I assume you took 20 per cent of that figure and then added it to that figure and came out with somewhere, I assume, $15,000?

A Very simply, if you divide that figure by 12, you have your answer.

Q What was your figure that you started with, your annual income?

A I need the green sheet you have in your hand. It wouldn't be on there so let me do it quickly here, because I don't have 1974. It would be $14,770.15. That would be the annualized 1974 income.

Q Now, I think you have next stated, and stop me if I am wrong, that among other things you increased that fourteen thousand seven hundred -- I'm leaving off the change only for simplification, you increased that at the rate of seven per cent annually up til what you determined was the end of his work expectancy?

A Exactly. That's after 1976.

Q Now, what did you do for '75 and '76?

A I took this $14,77 -- let me put it this way: I took the monthly earnings that that represents and I then grew them out according to the scheduled increases in the union contract through 1976.

At the end of 1976, we then have some --

Q Right now I am just up to the end of '76.

A All right.

Q When you say you grew them out, there has been testimony about two types of raises that an employee who is a mechanic aide gets. I am not talking about who gets promoted.

Number one, is that employee will start at the minimum salary level for that grade and will, the testimony has been, four times a year at $6 a time, will ultimately work up to the maxium salary at that grade.

I think they call that a promotional increase. I forgot the word.

A That seems like a reasonable way of describing it.

Q That's number one. Number two, is that if one looked at the collective bargaining agreements which are in evidence for the last eight years or so, one will see an increase across the board in all salary ranges at a certain percentage. We agree?

A Yes.

Q Now, what you did, and stop me if I'm wrong, and I'm now talking about the last two years, from the beginning of '75 up til the present time, what you did is you took the seven per cent figure, and stop me if I'm wrong, but you did not take into account the advancements within his job classification, these promotional increases that would have been received by Mr. Lavender.

A Are we talking about through '76 now or through the whole period?

Q Through the end of '76, beginning of '77.

A That's correct.

Q Now, did you --

A I should point out not seven per cent, but the scheduled increases in the union contract which through '76 were higher than seven per cent.

Q All right. But in any event, you did not in any way take into account what we call the promotional raises?

A That's correct.

Q Now, do you agree with me that as a matter of contract had Mr. Lavender lived, he would in fact have gotten these promotional raises?

A I would have to say I am perhaps not that familiar with the contract to say that was an automatic result of being an employee.

Q Incidentally, had you ever seen the collective bargaining agreements?

A I have seen two of them and I have looked through them but it's been some time since I scrutinized them carefully.

Q In other words, you had seen them before you prepared your analysis?

A In the process of preparing my analysis.

Q Well, if I may, just for edification, point to the last one, this is the one at the present time. It was a later number exhibit but the earlier number exhibit is the later agreement.

I think it was on Page 84. On Page 84 as of October 31, 1976, which is the last date, that is, as recorded in this collective bargaining agreement, it indicates that the minimum for mechanics "A" is $6.48 1/2 an hour and the maxiumum is $8.29 1/2 per hour. And that would be a difference of about $1.60 or $1.81, whatever it is, per hour; is that correct?

A $1.61 -- no, 81, you're right.

Q That's the trouble when you use calculators too much.

THE COURT: May I look at that?

MR. GINSBERG: Certainly, your Honor.

(Handing.)

(Pause.)

THE COURT: Now, something that I don't understand here is the premise for all of this.

This agreement became effective March of 1975 and prescribed and fixed the pay scale for two years and three months, through June 17, 1977, I assume.

MR. GINSBERG: That's correct.

THE COURT: This is the way Con Edison was going to pay its workers for that period of time.

Now, as I understand it, if you are an "A" mechanic you get raises according to this schedule every three months.

MR. SCHAFFER: Your Honor, if I may correct this misstatement because it has gone on for some time.

According to Page 69 of this collective bargaining agreement, and according to my notes as from the testimony of the union representative, that it was every four months, that is, three times a year.

MR. GINSBERG: I certainly apologize for that unintentional misstatement.

THE COURT: In any event, you get a wage progession plan and you get progress payments in accordance with this Exhibit 14, and in no other way. You do not get across-the-board increases during the period of this agreement.

MR. GINSBERG: I'm sorry, your Honor, I think that's incorrect.

MR. SCHAFFER: Your Honor, defendant's counsel agrees with plaintiff's counsel that there are two types of increases. There are the wage progression increases, which are $6 per week three times a year. Then if your Honor will turn to Page 84 you will note that in addition there are across-the-board increases.

MR. GINSBERG: By that we mean there are different dates on the top of that page. Each time a different date comes, then there is an across-the-board increase as reflected in the amounts listed on Page 84.

THE COURT: Now that clears up some confusion in my mind, because I was not following this.

MR. GINSBERG: That was our advantage because we had the books in front of us.

THE COURT: The only difference between me and a juror in this case is that I could ask for the book.

MR. GINSBERG: You also have a black robe, your Honor.

THE COURT: You took account of the three progression payments per year but you did not take account of the across-the-board increases.

THE WITNESS: The other way around.

THE COURT: Now, what's the certainty that somebody is going to get the progression increases?

MR. GINSBERG: I think maybe Mr. Schaffer and I agree that it is automoatic three times a year, every four months.

THE COURT: We are talking about $18 a year times two.

MR. GINSBERG: No, we are talking about -- I'm sorry, your Honor. Maybe I misunderstood you.

THE COURT: We are talking about $6 three times a year, which is $18 for the first year and $18 for the second year.

MR. GINSBERG: No, it is $6 each week.

THE COURT: I know but it is an increase in the pay scale of $18 a year.

MR. SCHAFFER: That's correct. But it would then have to be multiplied by the number of weeks.

MR. GINSBERG: 52.

MR. SCHAFFER: It couldn't be multiplied by 52 either.

THE COURT: I understand that. But the worker's earnings, under that theory, are increased $18 at the end of the first year and $18 more at the end of the second year.

MR. GINSBERG: That's correct, until they reach maximum.

THE COURT: I know, but that gets us to the end of '76, and according to Mr. Berenson there were only two more to go. So that's $12 more on this man and he would have been at the maximum.

MR. GINSBERG: Right, that's correct, but may I make one small addition.

Mr. Fitzgerald did not count '75 or '76. That would be another $36.

THE COURT: I understand, but your presentation of proof was on the basis that this man was going to remain an "A" mechanic.

MR. GINSBERG: That's correct, your Honor.

THE COURT: Once you get to the top of being an "A" mechanic, I gather there are no more $6 payments.

MR. GINSBERG: That's correct.

THE COURT: And we only had two more $6 payments to go as of the end of '76.

MR. GINSBERG: That's correct.

THE COURT: So we are $12 short of the top.

MR. GINSBERG: That's correct.

THE COURT: Once you hit that you then do not get any more increases within that grade, you only get the general increases?

MR. GINSBERG: That's correct.

THE COURT: This gentleman, in effect, has accounted for the general increases by the seven per cent each year for 32 years, or whatever it is that we have.

MR. GINSBERG: I agree with that.

THE COURT: The only point open to question is that he has not put in $18 for '75 and $18 for '76 and presumably $12 for '77. That's the only thing that is open.

MR. GINSBERG: That is a hundred per cent correct, your Honor, as far as I am concerned.

THE COURT: I now understand it.

That's the way you did your calculations?

THE WITNESS: Well, if I may elaborate on the status of my knowledge of the case.

THE COURT: Well, this is the basis on which you did your workup and I am trying to find that out because as the trier of the facts I have to make that determination and assess what assistance these experts are to me, so I would like to hear wht you have to say.

THE WITNESS: The only information I had in terms of doing this analysis was the 1974 NYC-2 form of Mr. Lavender's, which gave his annual wages. I did not know precisely where he was in terms of the interval from the minimum wage to the maxiumum wage for mechnic "A". I did know he was a mechanic "A". I did not know what per cent of that income reported on the W-2 was overtime income, what per cent was straight pay. So basically what I did, I took what I had andused it and then compared it with what I would have gotten if he had been at the maximum wage payable to a mechanic "A," and simply worked this striaght 40 hours a week, 52 weeks a year at that maxi-m mum wage, and I came up with a higher income estimate so I used the higher income estimate. That was the basis for my reasoning.

As I say, I lacked certain information as to where he was in the interval and as to what part of his income was overtime, what part was straight time.

Q Let me explore that with you, if I may, for a moment, Mr. Fitzgerald. His Honor did the addition which cwould come out to $48, $36 for '75 and '76, the $12 yet to go would be $48.

Would you agree with me that if we moved to two-third into this year, at that point your prediction would be $48 less than Mr. Lavendar actually would have been earning per week had he still be alive?

A Well, first of all, if we presume that that is where he was in the wage interval between minimum and maxiumum, I have heard no testimony to that effect or at least I don't recall any testimony that identified exactly where he was. He may have been very close to the maximum to start off with.

Q Actually, Mr. Fitzgerald, if that is a problem I think we can probably figure that out. Maybe I would ask you, you have your calculator with you, do you not?

A Yes.

THE COURT: You all have the prior collective bargaining agreement effective through March 1st of 1975?

MR. GINSBERG: It is April 30, 1975, your Honor, according to the date.

THE COURT: May I see that?

MR. GINSBERG: Certainly, your Honor.

(Handing.)

Q Now, Mr. Fitzgerald, in order to calculate what level Mr. Lavender was at at the time of his death, one could take his income on a monthly basis for the year 1974, one could look at the collective bargaining agreements on a percentage basis to see the general increases, one could assume the $6 increases of two periods in 1974 before he met his death, and by doing that on your calculator, you could, could you not, find out what his weekly -- not weekly but what his hourly rate of pay was?

A Well, you get an average hourly rate of pay, but how are yougoing to ascertain what his overtime pay was and how that was distributed during the course of the year.

Q There has been testimony, and if you have a pencil, I will ask you to make note of it, there was testimony from the representative of Consolidated Edison that for the 10-month pierod in 1974, as straight pay, Mr. Lavender earned the sum of $9,506.40.

Now, maybe I could ask you to break that up into an hourly rate of pay.

A Assuming 40 hours for work week?

Q Yes.

(Pause.)

Q Keep in mind that is the 10-month figure, not the annual figure.

(Pause.)

A The difficulty that arises is that we don't know exactly how many days one can average in a month. I assume that figure. This is what I am talking about. Unless you know exactly what he was paid or what place he was in that interval, you can only come up with some rough idea, which you might even be off 15 cents, or whatever, which represents a step in that interval.

Q I want to get as good an idea was we can. In other words, the --

THE COURT: Where does this get you when you get all though with it?

MR. GINSBERG: Where it gets me, your Honor, I am trying to establish that over 30 years Mr. Lavender's income has been reduced, not taking inflation into account, has been reduced by a figure of $50 a week or $48 a week, to be more accurate.

MR. SCHAFFER: I believe that's incorrect. That's a matter of economics.

THE COURT: I don't understand that and it seems to me we are spending an awful lot of time in an area the witness says you cannot even got a responsible figure. I really don't want to spend an awful lot of time on that because you have established that he has not put these progression increases in which the contracts provided ought to be granted here on November 4, 1974, and March 2nd of 1975, and then '76 thereafter.

Did we assume he was at the beginning? Apparently there was some he was at the beginning of this progression starting in October of '74.

MR. GINSBERG: This is the problem I was trying to clear up.

THE COURT: The only way you can clear that up is by asking somebody from the company. It doesn't seem you can take this man who says he can't really work back.

MR. GINSBERG: I think he said he can work back within 15 cents.

THE COURT: 15 cents is the whole progression increase, as I look at it.

MR. GINSBERG: It's one progression.

THE COURT: So it doesn't help you.

MR. GINSBERG: If we have eight or seven, I think it's close enough. If we come close to Dr. Berenson's figure --

THE COURT: You are talking about $6 a week, not $50 a week. We are talking about $6 a week.

MR. GINSBERG: On the one progression, that's correct.

THE COURT: That's all that's at issue here at this point.

MR. GINSBERG: No, what I think what is at issue is Dr. Fitzgerald said that he doesn't know whether Dr. Berenson's figures as to when maxiumum would have been reached are accurate.

THE COURT: I know, but there has been no contexting of that at this point.

MR. GINSBERG: Then I will stop.

THE COURT: The defendant hasn't taken issue with that, as I understand it. Do you, Mr. Schaffer?

I don't know, maybe you do.

MR. SCHAFFER: Your Honor, I do not recall whether there was any evidence as to exactly what the hourly pay level of Mr. Lavender was at the time of his death. It's clear that Dr. Berenson made a certain assumption based upon information which I'm not aware of, that his level was such that he was, in effect, if he had gone through to the end of '76, would have still been two steps below the maximum. So in effect Dr. Berenson appeared to give him three steps in '75, three steps in '76, and then said there would have been two more steps, a total of eight steps. So Dr. Berenson's testimony was apparently based on the assumption that Mr. Lavender was eight 15-cent per hour increments below the maximum. That would have been $1.20 an hour below the maximum. That would have been $1.20 an hour below the maxiumum at the time of his death.

I have no information and I have heard no evidence to support that assumption, but that was obviously the assumption upon which Dr. Berenson relied.

MR. GINSBERG: I agree with everything Mr. Schaffer has said so far, and just to elucidate, Dr. Berenson said he called Con Ed to find out in fact which level he was at. But my only problem, your Honor, since in a sense I agree with Mr. Schaffer that there is no direct evidence of that and since I think Dr. Fitzgerald was questioning that, I was trying to have him calculate backwards because I think one can, with some degree of accuracy, show whether or not what Dr. Berenson said was true.

THE COURT: Go ahead.

Q Mr. Fitzgerald, just to make it easy, if he was making the ninety-five hundred whatever dollars --

THE COURT: $9,506.

Q $9,506, that would be on -- since it is 10 months, a monthly basis would be $950.64. Could you break that into the hourly rate?

A How many days do you want him to work per month? Does 21 sound like a reasonable number?

Q That's a good question.

Do you know how economists would figure that out?

A You are asking me to do something which I told you already is only going to give you a rought estimate, give or take one pay progression. If I take 21 days I get $45.27 a day. If I divide that by eight I get $5.66 an hour.

MR. SCHAFFER: Excuse me for interrupting, Mr. Ginsberg, but to save time, that figure which Dr. Fitzgerald has just given comes so close to the $1.20 per hour below the maximum upon which Dr. Berenson appeared to be basing his testimony, that defendant is willing to concede that that was roughly the hourly wage at which Mr. Lavender was at the time of his death, and shall we proceed from here?

MR. GINSBERG: Let me thank Mr. Schaffer for his courtesy.

Q So, Mr. Fitzgerald, then if we may start with that assumption, would you agree that based on that concession as of the two-third point in 1977, your progession would give Mr. Lavender $48 a week gross pay less than he was actually making?

A Could you repeat that again, please?

Q Surely. As of two-thirds of the way into 1977 when he would have gotten that last $6 promotional increase, would you agree that your figures would give him $48 a week less than he was actually making because you didn't take into account the $18 in 1975, the $18 in 1976, and the $18 in 1977?

A I would agree that, on all the assumptions so far, that as of the two-thirds of the way through 1977 my calculations implicitly assume a base rate pay of

$48 less per week. At that point in time the rate of pay would be $48 less a week, granted.

Q Would you also agree that since fringe benefitst and overtime have been calculated as percentages of base pay, that there would be also a reduction in those items if the Court is to take them into consideration -- I leave the second part of the question out. There would also be a reduction of those items as of that same period of time?

MR. SCHAFFER: Your Honor, I object to the compound nature of the question because the witness has already testified he is not taking fringe benefits into account.

THE COURT: Sustained.

MR. GINSBERG: That's true. I apologize.

Q Now, let me stick to fringe benefits for a moment. Was there a particular reason that you did not take into account the fringe benefits, those of the pension and welfare plan, that would --

A Yes. As a matter of fact there was a very specific reason why I didn't, although I must confess I did make some effort to account for pensions at a rather late moment. But the primary reason why Ihad difficulty making any calculations of this nature, although I did give them some very serious consideration, was that I was unable to get any information relating to the value of these benefits from Con Edison, despite numerous efforts I might add. And from the union as well, I might also point out.

Q Would you agree, though, as an economist that these are things that should be considered in determining economic loss?

A I would agree that there are certain elements of the fringe benefit package that ought to be considered.

Q Now, I think, if I understand your testimony, the figure that you arrived at as of approximately the present time, you then projected at a seven per cent annual increase through what you calculated to be the work expectancy, by the method you indicated of deciding when he was age 55 he would have a 92 per cent chance of being alive and so you took 92 per cent of what it would have been, and so on.

Maybe I can back track. Let me withdraw that.

Did you make your calculations on an annual basis and then take into account that factor of percentage of your survival, or did you do the whole thing at once and then do the percentage of survival?

A The whole thing was done in the percentage of your survival, it was put in after the -- to begin with, it was a certainty. The man will certainly work. I actually had him working through the age 62, to his 63rd birthday, which is perhaps a bit longer than Dr. Berenson's statement. I assumed that would occur with certainty.

Q What figure did you arrive at when you projected his gross wages, before you took into account this survival situation, up until the age of 63?

A You will have to give me my printout back.

Q I'm sorry.

(Handing.)

A The projection for income starting in 1975 when the decedent would have been 28 years of age, in his 29th year, and going through to the point of completing his 63rd year, that's his 63rd birthday, the total income, unadjusted, undiscounted, gross is $2,295,938.

Q And could you tell his Honor your calculation for gross income, not including fringe benefits, for Mr. Lavender for the last year that you calculated?

A That is, when he was 62?

Q Yes.

A $165,832.

Q Now, is there a way you could quickly calculate $48 a week for, let's say, a 30-year period into the future at seven per cent?

A Sure. 30 years into the future?

Q Yes.

(Pause.)

A $19,000, according to my calculations.

Q I'm sorry?

A $19,000, according to my calculation.

Q Now, would that be the annual salary of $48?

A That's right.

Q In other words, 30 years from now somebody would be earning that $19,000; is that correct?

A You asked me to calculate $48 a week times 52, grown at seven per cent per year for 30 years.

Q But the $19,000 figure would be the last year's income, it is not the total of all 30 years?

A It is the last years, you are right.

Q And I guess the mathematics is easy if somebody adds the 19 and the 165, you get about $164,000 and something. And I think you were here yesterday, I believe, when Dr. Berenson testified that the last year's salary would be also somewhere around $180,000?

A Yes.

THE COURT: Why did you put a seven per cent figure on it?

MR. GINSBERG: I could not hear the Court's question.

THE COURT: I asked why he used a seven per cent figure for 32 years.

MR. GINSBERG: I was going to spend my next 15 minutes of cross-examination on that but I will certainly yield.

THE COURT: Let me open the door for you.

THE WITNESS: As I think I explained, I simply took the average annual rate of growth in straight time hourly pay for electric and gas utility workers between 1967 and 1972. That came out to somewhere slightly over 6.8 per cent per year.

THE COURT: This is a figure that is occasioned by national inflation?

THE WITNESS: To some degree, certainly. Any rate of wage increase I think reflects at least partially the underlying rates of inflation in the economy.

THE COURT: Because theoretically if you had no inflation, and we are talking now textbook college economics, presumably wages would be what they are forever and ever.

THE WITNESS: Allowing for increases in productivity.

THE COURT: That's something once again. But a person who does a particular job, if there is no inflation, that person is going -- whoever is doing that job is going to get paid the same amount of money 10 years from now as they would today, absent inflation.

THE WITNESS: And absent productivity changes.

THE COURT: So then your seven per cent is what, is a part to account for productivity increases?

THE WITNESS: For both productivity and inflationary trends.

MR. GINSBERG: Excuse me, your Honor, with due deference, because I was going to explore this, I am not sure the Court is cognizant of what he means by productivity increases. That's not an individual thing.

The principle of that is over the years the worker's real salary goes up also because our economy is giving people more.

I am going to explore that with Mr. Fitzgerald.

THE COURT: The reason I am asking this question is that there seems to be some pretty authoritative New York law that inflation is not to be considered as a factor.

MR. GINSBERG: I strenuously disagree with that.

THE COURT: 271 N. Y. Supp. 2d, Page 872.

MR. GINSBERG: Can your Honor tell me the name of the case? Is that Sinachovich(phonetic)?

THE COURT: Yes. I seem to recall charging that in a recent death case over which I presided.

MR. GINSBERG: I will have numerable citations, your Honor.

THE COURT: I just want to be sure of why that factor is in there, because if the Court is not permitted to take inflation into account, then obviously your figures would be reduced substantially.

THE WITNESS: If the inflation were not taken in, it could conceivably be some reduction. I think in a task of this nature it is extremely difficult to separate out all of the components. I do believe that the seven per cent that was taken represents or reflects, to some extent, the rate of inflation that occurred during the period in which I looked at wages, historical wage changes.

It is inevitable that to some degree the rate of inflation in that economy at that time was incorporated in those calculations.

THE COURT: But if the Court is not to take inflation into account, then what? What does that do to your figures?

THE WITNESS: I think, as Mr. Berenson pointed out, it could be argued that as the -- if you calculate a set of figures with a fairly high rate of inflation and then you disallow that rate of inflation, well, generally speaking, during a period of high inflation you are going to have a fairly high discount rate or a high market rate of interest.

The question then would resolve around what would be the proper rate of discount. If there were no inflation, it would seem that the discount rate that would be in question would be lower. How much lower is another matter of issue.

The point is I think if you took inflation out completely there would be a basis perhaps for presuming a lower estimate, but whether or not it would be substantially lower, I think is open to question.

BY MR. GINSBERG:

Q Mr. Fitzgerald, let me explore for a moment a few of the matters you discussed with his Honor. You spoke of, in addition to inflation, something called productivity increases. First, could you explain the concept of productivity increases?

A Well, in fact it is very simple. All we are talking about is that a given worker in a given amount of time, over the time will be able to produce more. In that case the owkrers productivity has increased. In a given amount of time, a worker is able to produce more and then productivity is increased. If he is able to produce more, his services are than in effect more valuable.

Q Perhaps maybe I can put it this way:

As our economic society has progressed, have we, as a nation, become more productive on a per capita basis?

A Very definitely.

Q And would that mean in practical terms, leaving aside inflation totally, that a worker in 1900, and I am picking an example off the top of my head, might have to work two hours in order to be able to get a loaf of bread but today he might only be working an hour or 50 minutes or something to that effect?

A Is that true? Certainly it's true.

THE COURT: That is something else.

THE WITNESS: Well, no. That may reflect changes in the price of bread as well.

Q What I am really talking about is that historically people in our society for the same hours of work, as a total general across-the-board picture are getting more goods and services today than they got, say, 50 years ago.

A Yes, but that doesn't necessarily reflect productivity change. Again, the factor that reflects productivity change --

THE COURT: I think you explained it very well in your first answer. I don't really think we need to go on with this.

MR. GINSBERG: YOur Honor, I think --

THE COURT: I think what you are saying is that in a given industry, the industry, the industry itself might become more productive even though a particular operation might not and therefore it is reflected in what that particular worker should get because he is part of an overall operation.

I don't think you need to go further than that.

MR. GINSBERG: That is really not my point. Maybe if I can explore it for a few moments, I will be able to do it.

Q Mr. Fitzgerald, there is something called real wages; is that not true?

A That's true.

Q And real wages are wages that are adjusted to take out the effects of inflation, correct?

A Eseentially, right.

Q If we talk in terms of real wages, which would leave inflation out all together, would you agree with me that over the last 50 or 70 or a hundred, whatever number of years these statistics have been kept, there has been an increase in the real wages of workers after inflation has been removed from the picture?

A Yes, there has been.

Q And has that been calculated on a percentage basis?

A Oh, I'm sure there are numerous calculations of that nature.

Q Are you familiar with any of them?

A No, but I could hazard a guess to say real wages have increased two to four per cent per year.

Q If I may then turn to his Honor's question which he originally asked you, and since youpicked the two to four figure, I will take three, which is in the middle, which I guess is fair.

Would that mean that assuming we had absolutely no inflation, and let me backtrack one step. Is that a compounded figure or a single figure?

A The three per cent would be compounded.

Q Let's assume then, as his Honor asked you to assume, that there is absolutely no inflation for the next 32 years. Would I, therefore, be correct that even without inflation, if history over the last 50 or 70 years continues, a worker's wage would be rising at three per cent a year compounded?

A That would probably be a reasonable assumption.

Q Could you compound, taking the -- well, we don't need this case. Let's take somebody making $10,000 a year now. What would that person be making without inflation simply because of the rise in real wages 32 years from now?

A $25,800.

Q And to leave aside the eight hundred, that would mean he would be making whatever his salary, two and a half times that 32 years from now even if there were no inflation.

A That is correct.

Q Now, in computing your figure, I think you said of 6.8 per cent as an annual increase, I believe you indicated you referred to a government document of utility workers, and I think you picked the period of 1967 to 1972.

Am I correct in that period you picked?

A Yes.

Q Now, would you agree with me that the runaway inflation, if I can use that term, had not yet started?

A Well, I suppose it depends on how you want to define runaway inflation. During that period we were struggling with something called runaway inflation. If you recall in 1971, President Nixon imposed a wage-price freeze which was something fairly drastic at the time.

Q Do you recall what the average rate of inflation was during that period of '67 to '72?

A Well, I would be off the top of my head somewhat hard-pressed, but I would say in the vicinity of three to six per cent.

Q And would you agree with me that from '72 up until '77, that the rate has been substantially higher than that?

A Up until '75, I would agree with you. I just saw in the paper this morning that in '76 the rate was 4.8 per cent.

Q What I meant, and I agree with you a hundred per cent because I read the same article, but what I meant was as a total proposition for the five-year period, if you averaged that five years, it would come out substantially higher than the three to six per cent rate for the previous five years.

A But obviously if you choose your years, you can come up with practially anything you want. If you take the two highest years and average them you are going to get something in the vicinity of eight or nine per cent, sure.

Q In any event, what I am really getting at, and maybe I should have asked you it right off the cuff, Professor Berenson analyzed these contracts for the last seven or eight years and came up with a 7.1 per cent figure. I assume, but I will ask you, you wouldn't have any great quarrel with that particular figure as far as Con Ed workers were actually getting in terms of raising per year?

MR. SCHAFFER: Objection, your Honor. I think the question is redundant.

Dr. Fitzgerald already testified he used a seven per cent figure.

THE COURT: I sustain the objection.

Q Now, if we can return then to your figure of $2,295,000, whatever the additional amount in the small numbers which I didn't write, of total gross income over the years, what was the first discount you did?

Was the first step the survival rate situation?

A No. Well, the first point was to just discount the total extreme to see what the value of the discounted income stream was.

Q By that I assume you mean discounted to present value?

A Well, to present value as of the beginning of 1975.

Q In other words, you discounted it to a period of approximately two years before today?

A Yes.

Q And what figure did you come up with discounting?

A I should point out that the program that I have discounts it to the present value in 1976. So to go back to '75 you would simply have to divide it by 1.05, if your discount rate is five per cent. But as of January 1, 1976, the earnings stream, its present value is $814,831 rounded to the nearest dollar.

Q I take it from that, and maybe I am wrong, that same program would indicate what the discounted value would be as of today?

I don't mean exactly today but approximately today.

A Well, it doesn't indicate it. All you have to do is multiply it by 1.05.

Q About $855,000? That's just in my head.

A Yes, that seems to be about right. That's just in my head, too.

Q Two heads are better than one, I guess they say.

THE COURT: Let's go forward because I have motions all afternoon, and so I trust you are going to complete your examination.

MR. GINSBERG: Another half hour I will be done.

THE COURT: So keep going, please.

Q Now, the ultimate figure that you came up, the $287,000, which was that discounted until?

A That figure that I gave you was as of January 1, 1975.

Q And to get that figure up to today, one would multiply it by 10?

A 1.05 squared.

Q What?

A 1.05 to the second power.

Q And forgive my ignorance --

A 1.05 times 1.05.

Q What does that come out to?

A 1.103, to the nearest three places.

Q Okay.

A Sightly over 10 per cent higher.

Q So if one were to add about $29,000, that would be an approximate figure as of the present time?

A Correct.

Q Now, once you arrived at that discounted figure, what was the first thing that you took away?

A The first adjustment was made for survival probability.

Q Now, let's talk about that for a moment. We have been working with, and Dr. Berenson had referred to, something called a work-life expectancy.

A That is correct.

Q And those are tables compiled by the government that we consider fairly accurate. Would you agree with that?

A Yes.

Q Now, do the work-life expectancy tables take into account the fact that people will die?

A As far as I understand, they do, yes.

Q And would that mean, let us say somebody, to stick with this case approximately, if somebody is 28 years of age and he has a 34 point, whatever it was, work-life expectancy, that figure of 34 point something will include, will it not, the statistical possibility that that individual will die before he reaches his 65th birthday?

A According to my understanding of the tables, the work-life expectancy tables, they consider what the work life of someone who remains alive during the period will be.

Q So you are saying they don't take into account the fact that somebody will die?

A They take into account the fact that the work force shrinks over time because people retire and because people die. But as I understand the calculations, the manner in which they are made, we are dealing with people who remain alive, what is their work-life expectancy.

Q Let me put it this way perhaps: You discounted, and maybe I could ask you for the last year. What was the discount that you put on Mr. Lavender's potential wages for the last year, between '62 and '63?

A 75.1 per cent.

Q Was that a discount or a 75 per cent total?

A What we are saying in effect is that since he has only a 75 per cent chance of remaining alive through that period, then on average he can expect to earn only 75 per cent of what we assumed he would earn with certainty.

Q You were giving him 75 per cent of the total?

A Exactly.

Q So as you had indicated previously on your figures, again to round it out just for the principal, you said he would have made somewhere around one hundred sixty some odd thousand for that last year and you would have only given him credit for $120,000?

A $124,569.

Q But I was doing the principal without the exact figures. On the theory there was only a 75 per cent chance he would be alive.

A Yes.

Q What did you do after that for his 63rd year or 64th, 65th and 66th?

A I assumed there would be no earnings in that period.

Q Maybe that's what I am having a little difficulty with. You discounted the possibility of his death at an early age, but you didn't give him any credit for the possibility of his being alive and working either after his 63rd birthday or after his 72nd birthday, whenever his life expectancy tables would indicate he was going to die; am I correct about that?

A If what you are saying is I assume he retired at 62 or at his 63rd birthday, I did say that, yes. I assume he did retire on the basis of work-life expectancy tables.

As I understand the Con Edison contract, he would have been, at any rate, forced to retire from Con Edison at 65.

Q Would you agree with me, Mr. Fitzgerald, as an economist, that there are statistics in existence showing the percentage of the population that is employed after their 65th birthday?

A Sure.

Q And would you agree with me, sir, by your both using the life expectancy tables, which would have indicated -- let me just get the exact figure, that Mr. Lavender would have lived to about 71 years of age. On the one hand you took off on the possibility that he would die before he reached his 63rd birthday, but on the other hand you didn't go to age 73 and 74 and 75 and 76 to calculate, to his advantage, the percentage probability that he would have remained alive at that time, and you didn't go to the statistics book to look at the percentage probability that he would have been employed and earning money in those years of his life?

A No, that is correct.

Q Incidentally, how much did that discounting come to for this survival rate procedure that you used?

A I'm sorry, when you say how much it came to, I'm not sure I understand what you mean.

Q In other words, you had said that reduced to present value you got a figure, I think, of $814,000.

A $742,919, to the nearest dollar.

Q What would that be, about an $80,000 reduction, or sixty? Maybe 70, I think it is. You tell me though.

A About $70,000 on present value.

Q That would be $70,000 for this survival rate factor that you took off?

A Right, on his income. We are talking about on his income now.

Q I understand. I think you then made a deduction for taxes at some place along the line.

A That is correct.

Q Which was the next area you went into, taxes or personal consumption?

A Taxes first.

Q And what was the total amount in dollars that you took off because of taxes?

A In present value?

Q Yes.

A Do you want that adjusted for survival probability or unadjusted for survival probability?

Q Probably unadjusted will be fine with me.

A The unadjusted -- now wait a minute.

(Pause.)

A Perhaps it would be best to go back. It's approximately $300,000, a little bit over, $310,000.

Q Now, let me just ask you then a couple of questions about taxes.

First of all, the type of investments that one talks about by putting money in a long term bank account or by investing in a corporate bond, aside from municipal bonds where some of us are unfortunate to have some of our money these days, aside from those all of these other items are taxable, are they not?

A Yes, sure.

Q And not only are they taxable but am I correct that as far as the federal taxes are concerned, pursuant to the Noxon amendment, and I may have it by the wrong name, which limits taxes to 50 per cent on earned income and about 70 per cent on investment income, you can actually pay a greater rate if you invest a lot of money than you would if you earned the money?

A That is correct.

Q Now, the taxes that you took, and maybe we could just start with the present year. I think you indicated that you took somebody who had a standard deduction and you took somebody who itemized their deductions and then you found out from IRS the percentage of people that itemized versus the percentage of people that standardized, and using that as a weighted factor you averaged the differences between those two and you determined the amount of deductions from Mr. Lavender's income.

A Basically that's the way I did it, correct.

Q Now, what is the figure on itemized deductions and I am not going to run you through the whole 32 years, but as of this year or the year of his death, whichever is easier for you, or the one in between, what was the figure that you picked as far as deductions and exemptions are concerned?

A I don't have that information available. Exemptions, I took the three members of the family. So the exemptions were $2,250 for the federal taxes, $1,950 for the state and city taxes.

Q Let me stop there and I will come back to the deductions in a minute. These laws have been amended recently, have they not?

A The federal tax laws, yes. To the extent that it is possible to take into consideration the amendments I do so. Of course, the tax data, the statistics available on tax returns will not go available for 1976 for another four, five years -- three years anyway.

Q Out of idle curiosity, what tax years were you using?

A The data was from 1972.

Q That is as of now five years ago?

A Well, as of now, the last series of tax returns filed with 1975 tax returns. As of April 15th this year we will have to file our '76 returns.

Q Maybe I should ask this: How many years dated with the figures that you used?

MR. SCHAFFER: Objection, your Honor. I think it should be clarified as to what figures we are talking about here.

THE COURT: I thought he did in a sense, on direct examination.

MR. SCHAFFER: I want the record to reflect we are only talking about the percentage deductions at this point. We are not talking about tax rates or anything else. Just the percentage deductions.

THE COURT: Are you almost finished with this line, because I was going to take our mid-morning break?

MR. GINSBERG: Any time that is convenient for the Court.

THE COURT: Why don't we take a ten-minute recess at this point.

(Recess.)

(In open court.)

BY MR. GINSBERG:

Q Just one question and then I will turn back to the tax situation.

The concept of present value to which you discounted also, is the assumption of present value that at the end of the period of years the principal as well as the interest will have been used up?

A Well, the concept of present value exists by itself without any mention whatsoever of principal. The concept suggests, however, that if you compute the present value of some income stream, let's say, and you then take that present value and invest it at the discounted -- I'm sorry, at a rate of interest equal to the discount rate, then you could duplicate that discounted income stream, and at the end of the period of the income stream, you would have nothing left of the initial principal.

THE COURT: Now, you see, Dr. Berenson didn't do that or didn't necessary do that, because when I pointed out to him yesterday that a million dollars would earn $60,000, which was three times present loss, according to his figures, was twenty. I pointed out if you paid the twenty and reinvested the forty that was left over, you would end up, remember, I said, with three million four at the very end.

Obviously he was not figuring on the theory that you say. Otherwise if he did that, there would be $60,000 of income every year staring today.

MR. GINSBERG: I think in a sense both are right, your Honor. I think what your Honor is talking about is a different conceptof present value.

Your Honor is simply sayingif your Honor gave someone a million dollars and they put it in the bank and got $60,000 a year --

THE COURT: I had asked you what you were asking for and we rounded it off to a million dollars. We didn't round it off but you said more than $934,000, which I rounded off to a million dolalrs.

MR. GINSBERG: Correct.

THE COURT: And you invest that at six per cent you are going to get $60,000 of income the very first year.

MR. GINSBERG: That is correct, your Honor, but --

THE COURT: So that figure can't be one where it is anticipated that it will all be exhausted, that it will have made Mrs. Lavender whole, and will all be exhausted at the end. because if it is all exhausted at the end, then she has begun living at a $60,000 a year level right at the beginning.

MR. GINSBERG: I think, and maybe my concept is incorrect, but I think, your Honor, the discrepancy is because your Honor has assumed everything on a sort of straight line.

I think, just to take a simply example, by Dr. Berenson's calculation the last year's loss might be $180,000. So as you move toward the end of your wiping out not only the investment income, because, for instance, if you are getting sixty thousand a year, assuming that the principal is even in existence, which it might not be, if you are getting $60,000 a year, it means you might be taking a net loss for the last years. It's like amortgage where you figure the principal and interest and you wind up with nothing.

What your Honor did by simply taking a simple arithmatical example, you would up with the principal, which is, of course, true.

THE COURT: I see.

Q Let me return to a question on taxes. I had indicated, and I may save some time, that the $310,000 was your figure for the tax deduction, and I assume, since you said it was unadjusted, that that would be from the $814,000 figure that we started with.

A That is right.

Q Could you tell us, sir, based on your assumptions, what percentage of income you have calculated that this lower middle income American would be paying over the course of his lifetime on a percentage basis?

A Well, first of all, I don't know what you mean by lower middle income.

Q I was being flamboyant. I will withdraw the question.

THE COURT: Let's proceed here orderly because we are pressed for time.

Q What per cent of $814,000 is $310,000?

A Roughly 37, 38 per cent.

Q And Nelson Rockefller doesn't even pay that -- withdrawn.

MR. SCHAFFER: Objection.

THE COURT: Please.

A I might add --

THE COURT: There is no question pending before you.

Q Now, let us move from taxes to personal consumption. Again, what is the unadjusted deduction for personal consumption?

A The personal consumption was -- I don't think I can give you that straight off. That is taken out after taxes and after the adjustment for survival probability, I don't have it perfectly segmented into each little category, how much was taken off for each thing, because it depends which you take off first.

Q In other words, you, by taking away approximately three hundred eighty for survival and taxes, you would have ended up with a figure of maybe about four hundred seventy-five, and from that you took a percentage based on personal consumption.

A Well, let me just point out that the discounted value of consumption expenditures -- perhaps I can give it to you in some detail -- is $475,000, rounded off to the nearest thousand. That is with the discounted value of consumption expenditures out of disposable income for the whole family.

After we adjust for survival probability and Mr. Lavender's share of consumption, we come down to $278,000 rounded off to the nearst thousand.

A Since you have come up with the unadjusted figure, if we didn't have taxes to worry about and we didn't have the survival problem to worry about, would I be correct that you would have, out of an $814,000 discounted figure, taken away $475,000 for personal consumption?

A Not of Mr. Lavender's no. As far as the personal consumption of Mr. Lavender is concerned, I think I can give it to you. Let me just calculate it.

It is approximately $162,000.

Q And that was after the adjustment made when you had already subtracted survival and taxes?

A Yes, after survival, adjustment for survival.

Q What percentage did you use in calculating personal consumption to begin with?

A I used varying percentages, as I indicated.

Q What was the average? I don't need decimal points, just so we can save some time.

A The average was probably in the vicinity of 35 to 40 per cent, let's say that.

Q 35 to 40 per cent?

A Of total consumption expenditures.

THE COURT: This is assuming part of the child with a child and part of the time with no child?

THE WITNESS: Exactly.

Q Now, would you agree with me that a certain percentage of a wage earner's money who resides in an apartment goes to rent and a certain percentage to telephone and a certain percentage to utilities and a certain percentage to upkeeping of an automobile, if there is one?

A Certainly.

Q And could you give us a ballpark feeling as to when you get to disposable income, what percentage goes for those expenses that I have just indicated to you?

A I don't think I could give you a reasonable estimate off the top of my head, no.

Q Are there some figures that a third or a quarter of an average worker's income goes to rent?

MR. SCHAFFER: Objection. The question has been answered that Dr. Fitzgerald is not in a position to give sych estimates.

MR. GINSBERG: This is cross-examination and I think I can pursue it another minute or two.

THE COURT: All right, ask one more question but then I may sustain the objection after that.

Q This is the one question.

A What is the question?

THE COURT: Whether a quarter of the income goes to rent.

Q Isn't it true that a quarter to a third of the average worker's income goes to pay his rent?

A I can't say that it is true. It is conceivably true, let's put it that way.

Q Let me perhaps put it this way: All of those expenses I gave you, telephone, utilities, payments on an automobile, rent, all of those reamin exactly the same on the assumption that the widow and child remain at the same apartment, have the same automobile and have the same telephone and doen't get any more or less electrical appliances?

A I don't know that you can maintain that assumption.

Q Maybe I can put it the other way. Is it not true in your assumptions you assumed that the widow and orphan moved out into a smaller apartment, used less electricity, got a cheaper car that used less gasoline and didn't talk so much on the telephone?

A Well, I wouldn't put it quite in the terms which you have described it. But essentially we are saying that the window and child maintain the same standard of living, within possibley smaller living quarters.

THE COURT: We had some statistics yesterday that with a wife and child the husband's share of that was about 25 per cent, as I remember.

MR. GINSBERG: That's correct, your Honor.

THE COURT: Now, it would seem to me if the child is emancipated, the husband's share is now to be divided in some way as between two people instead of as between three people. And so the husband's share necessarily has to go up because there is now no child's share.

MR. GINSBERG: If I may, your Honor, because I think that is partially incorrect. Dr. Berenson testified as to the 25 per cent figure being an average figure that he took by computing 2.47 members of the family, saying that he took the 16 or whatever number of years that the daughter would have lived at home and then the 17 years that she wouldn't have lived at home, and that the average figure he got was this 25 per cent figure. He did not say that that was the figure when she was still living at home. Of course, we are now within an area of 10 to 15 per cent higher than, which is, over a lifetime, a considerable difference. That is what I was trying to explore on cross-examination.

Q Let me just ask this: Were you told, Mr. Fitzgerald, or did you care and request the information from Mr. Schaffer as to whether in fact the widow had moved out into a cheaper apartment or had sold her automobile or had taken these other savings that are built into your statistical analysis?

MR. SCHAFFER: Objection as to form.

THE COURT: Sustained as to form.

Q Are you familiar with the rent control and rent stabilization laws in New York in a general way?

A Very marginally, yes.

Q Would you agree with me, sir, if somebody has had an apartment for a period of five or six years, to get a smaller apartment in New York City at the present time would very likely, because of vacancy decontrol, would very likely require the payment of a higher rent and not a lower rent even to get a smaller apartment?

MR. SCHAFFER: Objection.

THE COURT: You know, I think we are getting off --

MR. GINSBERG: I will withdraw it.

Let me go to one last area and I think I will be done -- or two. One quick area and then one will take a couple of minutes.

Q Would you agree with me, sir, that going back historically over the last 50 years there is no such thing as a safe investment?

A Over the last 50 years? How do you define a safe investment?

Q Perhaps I can put it this way: Would you agree with me that the smartest and most brilliant minds, based on your own study and knowledge, the most brilliant minds in the investment field, the most experienced people have been wiped out over the last several years of our history because of investments they have made? Not all of them but some of them?

A Well, to answer your first question, I think over the past 40 years at least, and over 50 years, certainly the federal government bonds always represented a most secure type of investment.

Q What is the present interest rate on a federal bond?

A It seems to me we heard testimony that it was in the vicinity of -- well, a Triple A corporate bond was at 7.5 per cent.

Q That wasn't my question.

A Offhand I couldn't say. I would say in the vicinity of six to seven per cent.

Q Would you tell me where to get some of those? I'm sorry, that's facetious.

A Down the street, the Federal Reserve Bank.

Q And would you also agree with me, Mr. Fitzgerald, that for a person who has finished two years of high school and who gets a considerable sum of money, that she is now told to go out and invest in the investment market, that to say the least there are many dangers and pitfalls that are involved in that market?

MR. SCHAFFER: Objection.

THE COURT: I sustain the objection.

Q Are you also aware that a percentage, it would be about a third because of the mathematics in this case --

MR. SCHAFFER: Objection. If counsel is about to make reference to counsel fees, I think it is totally irrelevant.

MR. GINSBERG: I am not.

MR. SCHAFFER: I'm sorry.

Q That approximately a third of the net award to the client in this case will be put in a bank account for her daughter until her daughter achieves majority, would you agree with me, and we are talking about those kinds of accounts, we are going to have a frozen investment at s omewhere around six or 6 1/2 or some per cent in that area?

MR. SCHAFFER: Objection.

Your Honor, I fail to see the relevance of this line of questioning.

THE COURT: I sustain it.

Q Mr. Fitzgerald, let me turn to the last subject, which is services performed around the house. I think, if I can summarize, you said that a person other than the primary homekeeper, in this case the wife in Mr. Lavender's case, or the mother in Mr. Luger's case, that any other such person would be an overall consumer rather than an overall producer; is that a fair statement?

A That is correct.

Q You also then qualified it, I think, by saying that, well, after all, there are some things like heavy lifting and things of that nature that are sort of irreplacable and so you might give credit to the widow or the mother for services such as those.

Is that a fair summary?

A Yes.

Q Now, let me see if I can explore that. Let's leave out the heavy lifting. Let's assume that we have a kind of household, for instance, that Mr. Luger lived in where his mother and sister's did the laundry and they washed the dishes and they cooked the food and they did the sewing for him and he only mowed the lawn and did the painting and drove the automobile. And if you added up the hours, let's say it took his mother more hours to cook and do his laundry and sew for him and iron, and so on, than it took him to mow the lawn and drive the car and help his dad with the repairs.

Can we start by assuming that?

A Yes.

Q Now, he passed away. The truth of the matter is that while the mother may gain a few minutes of time in idleness, she has gained nother economically unless she is going to go out and sell those services to somebody else; is that correct?

MR. SCHAFFER: Objection.

A I think the question is not whether --

THE COURT: Go ahead.

A -- whether she has gained, bout what has she lost.

Q Perhaps it was my fault. I am breaking it down into two parts. The fact that the mother now spends a certain amount of time less because she is only doing the laundry for eight people, and I am going to assume it takes less time to do laundry for eight rather than nine people, so she gains 10 minutes a day, whatever she gains.

The fact she now does eight dinner dishes instead of nine and she saves five minutes there. And you add up all these gains she is now fortunate to have because her son doesn't need these services any more; unless she goes out and sells this time in the market, from an economic point of view she has gained nothing; correct?

A No, not correct.

Q Then explain why not.

A It seems to me the whole argument revolves around the fact that time has some sort of value, some economic value. If she has more time and is freed from providing these services, then that time can be allocated into other activities. If she enjoys watching soap operas in the afternoon, she could do that which she couldn't do before. That presumably has some value to her.

Q We agree that her leisure time may be increased, I concede that. But my question is that from an economic dollar and cents pecuniary loss, as the law calls it, point of view she may have gained some idle time but unless she goes out to wash dishes for 10 minutes at the neighbor's house and gets paid for it or do the laundry down the street or take in wash, unless she does any of those things from a dollar and cents point of law, she gains nothing by the time she has saved?

A What I am saying is the following; That the time that she gains in that fashion can be used to provide the services that were formerly provided by the decedent.

That is the basic point we are making. There is then no loss.

Q If Mrs. Luger now does the heavy lifting and mows the lawn and learns how to paint and perhaps do some laboring work that the father indicated, and goes to driving school to drive a car, that she can take those 10 minutes that she save from washing the dishes to do those other things and it will balance out?

MR. SCHAFFER: Objection.

THE COURT: I sustain the objection.

Q Would you agree with me, however, that if she doesn't do any of those things, if she doesn't learn how to drive a car and if she doesn't learn how to paint or do carpentry or minor repairs or lieft heavy objects or push a lawn mower, that she in fact has lost, from an economic point of view, all of the services her son provided and she must either hire somebody or take somebody else in the family ot do them for nothing, would you agree with that?

MR. SCHAFFER: The question is argumentative in the extreme. I object. In addition the witness has already answered the question that certain services, of course, will be necessarily irreplacable.

THE COURT: Yes, I understand that. I seem to recall the testimony was a little bit otherwise, in any event. I will sustain that objection.

Q Maybe I can approach it this way: As an economist you are, are you not, interested in the realities of life as well as theoretical possibilities?

A Yes, I am.

Q And when we are talking about the realities of life rather than theoretical possibilities, is it not true that based on your experience either from reading or from your studies in the real world, that in fact there are certain services traditionally performed by men, by husbands, by sons that traditionally that are not performed by mothers, wives or daughters?

MR. SCHAFFER: Objection.

THE COURT: The problem I have with this whole line here is that I remember Mr. Luger Sr. testifying that his son helped around the house, helped him put up walls, he cut the lawn once in a while, but it was a very general kind of statement.

I did not get the feeling that the son was continually occupied with these things. In fact, I got the feeling that it was really not terribly frequent. That with the lawn he helped with once in a while. He was one of eight children, so I gather other children participated in this. I really didn't get the feeling of any enormous time sequence here. He was working, giving $30 a week and that was basically it. So I don't see any point to his hard-driving examination about the contribution to the mother, which is what puzzles me in the cross-examination line that you are taking.

This is a family now that has a husband and wife and five children who are growing up and getting into various stages of having lives of their own. I really don't see where you get the foundation for all of these questions.

MR. SCHAFFER: If I may, I would like to point out that at no point in his testimony did Dr. Fitzgerald make any estimates or make any reference to the Luger case at all. He testified only as to damages to Mr. Lavender. I think any questions concerning the Luger family are inappropriate on cross-examination.

THE COURT: I just doesn't see the basis for it.

MR. GINSBERG: Let me leave the Luger family, based on your Honor's ruling, and ask one ore two questions --

THE COURT: I am just making an observation which goes to the fact that I don't see a foundation for that particular question.

There may be others that will occur to you that you want to ask, but it seems to me that question really doesn't have adequate foundation to make it worth the time.

MR. GINSBERG: Let me perhaps ask a couple of questions.

Q The life expectancy tables indicated that Mrs. Luger will outlive her husband by a period of about five years.

Have there ever been any studies done, to your knowledge, indicating the change in the services provided by the eldest son for his mother when she reaches old age and the husband and his family either is no longer available to perform these services?

A No, that not that I am aware of at least.

Q Would you agree, at least as a general principal, that in those years the son is likely to perform more services for his mother than he had before then?

MR. SCHAFFER: Objection. I don't think the witness is qualified to answer that question.

MR. GINSBERG: I will withdraw it.

Q One last question about the Lavender family.

In the Lavender case, you also did not project an economic loss, as I understand it, for the contributions that Mr. Lavender performed in and about the house.

A That is correct.

Q Have there been statistics done in that area?

A That estimate, what the husband's contribution to housewife is?

Q Yes.

A Yes, there are statistics.

Q Were you here when Professor Berenson testified about a certain source material he used?

A Yes.

Q Would you agree that that is a recognized authority in this area?

A Well, I have used work from the same two authors myself in similar types of cases.

MR. GINSBERG: No further questions.

MR. SCHAFFER: Just a few brief questions

REDIRECT EXAMINATION

BY MR. SCHAFFER:

Q Dr. Fitzgerald, in your use of the survival probability, as with the average life expectancy that Dr. Berenson relied on, these are taken from government studies which are averages over the entire population; is that correct?

A Yes.

Q Neither your figures nor his figures would reflect the fact that Mr. Lavender smokes two packs of cigarettes a day, would they?

A No. They simply reflect the general health situation of the population. the existing population. They don't get that specific.

Q Would the survival or life expectancy figures for a leavy smoker tend to be lower than that for the average person?

A Would the survival probabilities tend to be lower?

Q Yes.

MR. GINSBERG: With due deference, I think that is out of his expertise.

THE COURT: I will sustain the objection. I think as one who normally charges a jury, the rule to be applied is that the statistical workup in these areas are a guide to the trier of the fact and are not necessarily binding and must be adjusted, given the proof before the trier of the fact as to the parties particularly involved. So I am going to proceed on that basis.

Q Dr. Fitzgerald, you used a seven per cent rate of wage increase for Mr. Lavender starting with 1977 and projecting in the future; is that correct?

A That's correct.

Q And did that seven per cent rate in your opinion include an aspect for promotional increases?

A I should think that it would, to some extent, yes.

THE COURT: I think it is conceded that the promotional increases were at an end after, whenever it is in 1977 --

MR. SCHAFFER: The progressive $6 a week step increases were at an end. What I am seeking to bring out is that both expert witnesses have assumed or did not make any assumption that Mr. Lavender would become a supervisor.

THE COURT: That is correct.

MR. SCHAFFER: Which was the only step above that he could have been promoted to. What I am seeking to bring out is that the seven per cent increase in a sense includes in it some possibility for further promotion.

Q Is that a correct statement of what that seven per cent represents?

A I should think that it would include or to some extent include step-ups of that nature. Because it is simply a growth rate between two average wage levels, and the average wage levels between two points in time reflect the fact that at least part of the labor force, that part which remains in the job are experiencing promotional increases.

Q With respect to the contribution of inflation to the wage increases, I believe you testified on cross-examination that in your opinion that inflation would represent somewhere in the vicinity of four per cent of the seven per cent figure that you used.

A Well, to the extent that I used the seven per cent figure, and we sort of agreed upon a three per cent average growth of productivity figure, the difference there would be four per cent.

Q You also stated that to the extent that inflation were to be wiped out of all consideration so that the average wage increase would be three per cent instead of seven per cent, that there would also have to be some reduction in the discount rate; is that correct?

A Well, it is.

Q If we assume that there is a four per cent inflation being taken off that seven per cent figure, in your opinion would the discount rate reflecting interest rates in the economy, would it be reduced by the same percentage, a lesser percentage or a greater percentage?

A Are you talking about absolute percentage reduction, that is, the number of percentage points taken off?

Q That is, would there be an exact correlation between the decline in wage increases as a result of not taking inflation into account and the decline in interest rates, or would interest rates decline less or more?

A Well, it seems to me if we are talking about a discount rate of five per cent, if you take four percentage points off that and end up with one per cent as a discount, rate, that seems to me to be not highly probable and that really is the basis of my earlier statement to the effect that it might require some downward adjustment.

Exactly what discount rate then that one would use I think would have to be -- the only approach that one could take would be to appeal to the evidence, what sort of interest rates of a tax-free nature prevailed in periods of no inflation.

I think that it would probably be in the vicnity of maybe two per cent, but one per cent to me seems to be quite low. Again, we would have to appeal to the record, I think.

THE COURT: What you are saying is this is an area that involves an appreciation of theory that you live with and I don't, but what you are saying is that if you take or to the extent that you reduce inflation in your thoughts, you are similarly reducing the discount rate because the market, not quite the same but perhaps to a large measure, would be reacting to the absence of inflation at the same time?

THE WITNESS: That's right.

THE COURT: So you end up at almost the same place, not quite but almost?

THE WITNESS: That's right. If I may elaborate.

THE COURT: Please do.

THE WITNESS: My own feeling on this is to a certain extent inflation can be a red herring in the sense that you have just described.

To the extent that inflation or certainly if inflation is anticipated, a certain rate of inflation, that ought to be fairly closely reflected in market interest rates.

So if you expect, without inflation four per cent rate of interest on high grade corporate bonds and the rate of inflation increases to the anticipated five per cent a year, it is reasonable to expect interest rates to move up to somewhere in the vicnity of nine per cent.

So if you take inflation out of the increment to earnings, you also have to take it out of the discount rate which you use. If you put it into the earnings, you have to put it into the discount rate. So to some extent it is a wash.

Q Dr. Fitzgerald, you testified on cross-examination that by using survival probabilities you obtained a figure only for lost earnings and that you did not continue to use those survival probabilities into the retirement years; is that correct?

A That's correct.

Q And is that because your estimate that you prepared was only an estimate of lost earnings and did not include such fringe benefits as pensions?

A The estimate that I presented here, that's correct.

Q So that for purposes of estimating only lost earnings, the fact that you cut off using the survival probabilities at the age of retirement in no way renders inaccurate your estimate of lost earnings, does it?

A Through that period, that's correct.

Q One final point, Dr. Fitzgerald.

In evaluating future increases in wages, which I think is evident from the evidence now and is perhaps the critical element in determining damages in this type of action, are we dealing in any realm of certainty or are these figures, the seven per cent figure you have used or the 7.1 figure that Dr. Berenson used, just how certain are these?

A Well, I think perhaps the best way to answer that is that they are certain as you are certain of the rate of inflation because that seems to be the really variable factor, historically, in the analysis.

We have discussed the issue of productivity, and at least over an extended period of time there is I think reasonably evidence to suggest a continuing growth in the productivity of labor. And if you looked at individual workers over the period of their lifetime, you would observe increases in their productivity as they become more familiar with the job and grow in the job, they become more productive through that and as new technology is brought in, they become more productive.

There is some overall increase in productivity for workers in general as time goes by. And over the age spectrum, there is some. I think that this is fairly well documented.

Q So, in other words, the productivity aspect of the wage increase you feel is a pretty accurate projection in the future?

A Yes. I think to go into the future at three per cent, assuming no inflation, or somewhere in the vicinity of three to four or two to four per cent, is reasonable.

Q Now, with respect to the inflation aspect, to project a continued inflation at four per cent over the next 34 years, do you feel equally comfortable or certain about that figure as you do with the productivity figure?

A I'd have to say no to that.

Q Would it be, in your opinion, somewhat of an over estimate of inflation to be continuing to use the four per cent figure?

A I would say for the next five to 10 years possibly not, but beyond taht there is just no way of saying.

MR. SCHAFFER: Thank you, doctor, I have no further questions.

THE COURT: Thank you, doctor.

MR. GINSBERG: I only have, I hope, two minutes. May I, your Honor?

THE COURT: All right. Two minutes.

RECROSS-EXAMINATION

BY MR. GINSBERG:

Q When you used the statistic which came to 6.8 per cent of increase in wages during the '67 to '72 period, am I not correct that what you were talking about was the same job classification?

In other words, if a mechanic -- it was not done by individuals, to say Mr. Smith, was he making a certain amount more in '72; it was done by Machanic A or whatever?

A That's right, maintenancemechanics. The 6.8 is what I calculated, I used and adjusted it off to seven per cent.

Q But it did not take into account that these maintenance mechanics became promoted to foreman during that five-year period?

They were still maintenance mechanics at the end of the five-year period?

A True.

MR. GINSBERG: I will stop because I think we have gone into the other area well enough.

THE COURT: You are excused.

(Witness excused.)

THE COURT: You wanted to have some oral argument but it is almost 1:00 o'clock.

How long had you anticipated speaking?

MR. GINSBERG: Your Honor, I have a new thought which just came to me, and I don't know if it will fit in with your Honor's convenience.

My new thought is that maybe we could present the written material and then at any time that suits your Honor's convenience, even at 4:30 some afternoon, we could come in and spend 15 minutes each in arguing after the presentation, the written presentation was made.

I don't know how that would fit in with your Honor's feelings or plans. That might be easier to clarify the areas we would be approaching.

THE COURT: Can you not do all of this in written form, if that is what you want to do? In other words, to submit a post-trial memorandum? How does the government feel about that?

MR. SCHAFFER: Your Honor, I believe either one or the other would be sufficient. The government doesn't feel it needs a post-trial memorandum and oral argument. If your Honor wished written briefs, that would be all right.

THE COURT: I want something from you in writing as to what your contentions are on the figures, what you contend the record justifies here and what you contend the record justifies here.

Perhaps if you are going to do that in writing, you might as well do whatever else is to be done in writing because, obviously, it is all addressed to the same thing.

MR. GINSBERG: If I may be frank with the Court, as the case has progressed and we have gotten into areas that are areas of economics, as much as law, I have found areas where I have been somewhat ignorant and I have found other areas -- I am trying to think of how to express it -- I wasn't thinking necessarily along the same lines that the Court was. That's why I was hoping that after the presentation of the written material we might have some opportunity to exchange views because I certainly have been made aware of some of your Honor's views during the course of the trial that I had not known about prior to the trial.

So it would just seem to me in this serious a case if either I --

THE COURT: Let's do this. Why don't you give me what you think the figures justify and you can also put in there any law that you want me to consider on those figures and we will set a time. It will be in the week after this week.

MR. SCHAFFER: When would you like the memoranda submitted?

THE COURT: Well, if you get it to me by Monday a week, that is fine.

MR. SCHAFFER: With respect to the memoranda, would you require or would you prefer that the parties obtain copies of the transcript and make specific references to pages of the transcript, or is it sufficient to talk generally about it?

THE COURT: You may talk generally. I have taken good notes during the course of this proceeding. You may talk generally.

These memoranda are going to be very simple matters. I don't anticipate these will be extensive matters. You can make it as extensive as you want. What I am looking for, for example, is for the plaintiff to say on this record Mr. A is entitled to payment of the medical bill, hospital bill, funeral bill and these bills are in the amount of dollars so-and-so. The loss of income to the plaintiff and the daughter, as the case may be, is, on this record in my opinion, so-and-so. That's where you end up. And then vice versa.

MR. SCHAFFER: The memos are due on January 31st.

THE COURT: Let's put this on for perhaps two or three days later so we don't lose freshness with this.

(Pause.)

THE COURT: Thursday, the 3rd of February, at 4:00 o'clock. I am holding motions and that will be approximately a good time.

MR. GINSBERG: One more very minor matter concerning this case.

At the beginning of the trial I had shown Mr. Schaffer a letter from the Compensation Division at Con Ed indicating the payment of certain medical bills.

He had told me that he would concede them if I could bring in proof that they were the accurate amounts.

I must apologize for my two witnesses being out of schedule yesterday which made me forget about it. I do have somebody from Con Ed who has come with the vouchers for the bills and I wonder if I may add them to the record.

MR. SCHAFFER: If Mr. Ginsberg will make a representation as to what the evidence will show in the way of an offer for proof, counsel for defendant will accept that in lieu of live testimony.

MR. GINSBERG: Would the gentleman just come up and I don't think you even have to be sworn.

(Pause.)

THE COURT: Your name, sir, is what?

THE WITNESS: Robert DeVino.

THE COURT: You brought bills from Consolidated Edison?

THE WITNESS: Just one paid bill.

THE COURT: You represent to us here that is an authentic bill from the files and records of Consolidated Edison?

THE WITNESS: Yes.

THE COURT: That is all Mr. Schaffer is looking for.

The amount if what?

(Pause.)

THE COURT: Do you need me or can you just read it into the record?

MR. SCHAFFER: Let us do this to save time. The hospital bill is already in the record. Prior to the continuation of the trial today, Mr. Ginsberg and I made a com putation as to what the additional medical bill paid by Con Ed was.

Let us read that figure into the record, subject to further disucssions between Mr. Ginsberg and myself. I'm sure we are not going to have any difficulty on this. If we should, we can make that apparent in our memos of law.

For at least present purposes, in addition to the hospital bill, which is already in the record, there were further medical expenses paid by Con Edison in the amount of $1,428.80.

THE COURT: This is as to whom?

MR. SCHAFFER: This is as to Mr. Lavender.

If there is any problem, we will bring that to the Court's attention in our memos of law.

THE COURT: Thank you very much, gentlemen.

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CAROL LAVENDER, et al.

vs. 75 Civ. 3520 (RO)

UNITED STATES OF AMERICA

New York, New York
February 3, 1977 - 4:55 p.m.

* * * *

Trial resumed.

* * * *

(In open court.)

MR. SCHAFFER: May it please the Court, my name is Frederick P. Schaffer, I am Assistant United States Attorney, I represent the defendant in this case.

Pursuant to the Supreme Court's directions, we have filed a post-trial memorandum of law in which we have discussed at some length the evidence and the value of compensation which we believe is proper in this case, based on that evidence. I will avoid going over that material, but seeing as the post-trial memorandum never made it up to your Honor's chambers, I will, to some degree, repeat some of the discussion that is in that material.

I also wish to point out that we have, of course, also filed a trial memorandum in this case and the trial memorandum contains with a few exceptions the case law which we feel is applicable to this case. The post-trial memorandum is largely directed toward a discussion of the facts.

Turning first to the case involving the decedent John Luger, the claims for relief for Mr. Luger involve certain funeral expenses which are conceded and the sum of those funeral expenses is stated in our post-trial memorandum of law.

Secondly, it pertains to a claim for pain and suffering. Turning to that claim, it is the defendant's contention that the evidence in this case is simply too thin to support a finding that there was, in fact, any conscious pain or suffering at all. Mr. Luger was pinned between the two trucks after the accident, his eyes were opened and apparently glazed, but there was no indication of any speech or any sound at that time. The only movement that was observed was the movement of the coffee stirrer in his mouth, which defendant contends is perfectly consistent with a lack of consciousness, such involuntarily movements would not at all be surprising under those circumstances.

After Mr. Luger was taken down from between the two trucks there is testimony of a slight moaning sound, by the police officer who also testified that he had on other occasions heard such a sound at the time when an individual expired.

We believe, your Honor, that in order to show conscious pain and suffering more must be shown and indeed the case law supports us, than the kind of movement involved with the coffee stirrer or even a slight moaning sound. The evidence must be more substantial that either the sound or the movement were voluntary or conscious as opposed to involuntary. We believe that the evidence in this case is simply too weak to support such a finding.

We noted in particular, your Honor, that the death certificate for Mr. Luger stated the time of death at 4:15, which was less than one hour after the accident. The accident occurred somewhere between 3:20 and 3:30 a.m. The suggestion in view of the time frame that Mr. Luger's co-worker, Mr. Church, testified to, that Mr. Luger may very well have died before he reached the hospital. The hospital records are somewhat unclear on that as to whether he was dead on arrival or dead after arrival. But, in view of the very short time frame involved, in view of the exceedingly weak evidence of any consciousness whatsoever, we submit that an award for pain and suffering is not justified.

There was initially a claim made as part of the recovery for the estate of Mr. Luger for lost household services contributed. I note in plaintiff's post-trial memorandum that that issue seems to have been ignored in the case of Mr. Luger, and I believe that that concession was well-merited.

As your Honor noted at the trial, the evidence of Mr. Luger's contribution to household services was exceedingly weak. He lived in a family where the mother and daughters did most of the household work. The testimony was that he occasionally mowed the lawn or helped his father with household services. But as Dr. Fitzgerald pointed out on the stand, in the situation like that of a young man working full-time, he was a net consumer rather than a contributor of household services and in that case there is no damage to the family.

Your Honor raised the question at the trial as to whether that was a proper consideration and we have in the footnote to our post-trial memorandum dealt with that subject. The argument very simply is as follows: New York law permits recovery for damages, that is compensation for something lost. If an individual contributed more to other members of the family in the work that they had to do, than he himself did in the family, it's perfectly clear that the family of the distributees in this case are suffering from loss from the point of view of household services and we strongly support that the evidence supports that conclusion in the case of Mr. Luger.

Finally we turn to what is the most substantial issue concerning Mr. Luger and also Mr. Lavender, and that is the lost earnings of the lost contributions to the distributees. As we point out in our post-trial memorandum of law, Mr. Luger's contributions according to his father's evidence were based on family need. They were not, as we stated in our memorandum of law, an excise tax. And yet Dr. Berenson, the expert for plaintiffs, took on the basis of twenty-two months' experience, a figure of fourteen per cent of gross earnings as being Mr. Luger's contribution and then proceeded to project that over his entire working life -- excuse me, over the expected life span of his mother, as though he would continue to do that throughout his life. We find that analysis exceedingly oversimplified.

The father, Mr. Luger, Sr., testified that he did not anticipate his son would continue to make contributions after his son married and set up his own household.

The case law as we cited in our post-trial memorandum of law clearly supports consideration of the possibility of marriage and although the evidence did indicate that Mr. Luger was not seriously involved with any woman at the time of his death, the Court can surely note that there is a probability of remarriage.

The Court did accept into evidence over our objection a picture of Mr. Luger and as the Court noted on one occasion he was indeed a fine looking boy and it would seem that in all probability we are dealing with an individual who would not have remained living at home single for more than five years.

THE COURT: You have a $15,000 figure.

How do you get to that?

MR. SCHAFFER: Your Honor, it's a little difficult in these areas to be entirely scientific. It was our belief that the contributions of $30 a week, first of all, must be roughly halved to take into account Mr. Luger's personal expenses. He did take two out of his three meals at home, he undoubtedly added to expenses for wash, for laundry; Mrs. Luger testified as did Mr. Luger that they purchased for him perhaps $150 worth of clothing per year, so we are really dealing with a net contribution of approximately $15 a week. We estimated that that would continue over a period of five years --

THE COURT: But that gets you to $5,000, not $15,000.

MR. SCHAFFER: Yes. Of course in addition we realize there is some possibility of contributions in the old age of Mr. and Mrs. Luger by the son John. It's very difficult to know exactly what those probabilities are. We have argued in our post-trial memorandum that they are relatively low, in view of the fact that Mr. Luger had a good job, his earnings would have continued to increase, he had a pension plan, he would have been eligible for Social Security, he had life insurance and he had other children to help with the expenses. So the possibility of a contribution by John Luger to his parents in their old age is relatively remote.

We also note that that contribution would have occurred at a point in time quite distant from now and would have had to be reduced to present value.

Viewing those various factors and concededly less than completely scientific way, we felt that an extra $10,000 for that possibility was more than adequate and indeed was generous. It was based on those two factors, the contributions on the probability that he would have lived at home for another five years plus the possibility of contributions in his parents' old age is what led us to a figure of $15,000. I think -- I say in all sincerity we believe that is a generous offer.

As as defendant, we are not in a position of all other defendants. We believe, this office believes that the United States has an obligation that goes beyond that of any tort feasor, we have an obligation to be as fair as we can. With respect to all estimates in this case, your Honor, it has been our sincere purpose to reach a figure which we felt was fair and was justified by the evidence. It has not been our purpose to reach as low a figure as possible, as some attorneys will do in order that in case the Court compromises between one financial figure and another, we should be as low as we can.

Turning to the Lavender case, there again were medical and funeral expenses which we have conceded. The exact figures are contained in our post-trial memorandum of law. There is, in addition, a claim for pain and suffering.

There is no question that Mr. Lavender was conscious. The period of consciousness was approximately five and a half hours. Since the hospital records indicate that he was given anesthesia for an operation at approximately 9 o'clock in the morning and thereafter never regained consciousness, or at least there is no proof in the case that he ever regained consciousness. He suffered numerous internal injuries but it is important to note that according to the testimony of his co-workers, and particularly that of Mr. Sperra, when asked"How are you, "how are you feeling,"he responded on two different occasions, "Well, I have got a little pain."

I don't mean to make light of this situation. I'm sure he did have pain, but it was not a situation where the plaintiff or the decedent, rather, was crying out in constant pain or agony. He did cry out on two occasions when he was actually moved, once onto the stretcher to go into the ambulance and once in the hospital off the stretcher onto a hospital bed. He did groan on both of those occasions. But this is not a situation where we have constant and excruciating pain, I do not believe.

There is also, of course, the element of the awareness of death. He did indicate that he was frightened.

Taking all of those facts into consideration, particularly the relatively short time involved, we estimate that an award for pain and suffering for $15,000 would be indeed generous.

There is a claim for loss of consortium which we believe we have shown in our trial memorandum to be unsupported by the law. There is a very long series of cases under the law that there can be no recovery for loss of consortium, loss of companionship or whatever it's called in a wrongful death action. As your Honor is aware, there is no cause of action for wrongful death under the common law, it's purely a statutory creation and all the cases we are aware, going back quite a ways, hold you can't recover from that.

Plaintiffs rely on a recent decision of the Second Department Appellate Division where in particular today there is a comment that a cause of action might lie for loss of consortium. The dissenting judges, I believe it was a four to three decision, it was a vigorous dissent, pointing out that it was dicta and also pointing out that it flies in the face of very well settled New York law, also in the Court of Appeals, and we believe that that dicta should be ignored.

Finally we turn to the -- well, it's not finally, we turn to the question of lost earnings. That is the biggest issue, let me save that for last.

There is a claim for lost household services and again we would maintain as with Mr. Luger that there is no evidence to support recovery. Mr. Lavender, according to his wife, occasionally fixed some things around the house. That is the extent of his household services. Again we are dealing with an individual who worked full time and whose wife provided most of the household services. He was undoubtedly a net consumer of household services and we feel that there is no economic loss to the distributees for that.

There is also a claim for the loss of parental care and guidance. On that issue quite frankly, your Honor, as you will read in our memorandum of law, we really threw up our hands and said it's impossible to reach a rational determination of that amount because on the one hand New York law is as clear as can be that there is no recovery for loss of affection, or grief, for loss of companionship, for all the sentiment that obviously goes into the loss of a father. The settlement is to be limited to the pecuniary value of the loss of parental care.

Your Honor, having recently become a father myself, I really am not prepared to suggest any rational way that the pecuniary value of a father to his infant daughter can be calculated. Therefore, as I said, quite frankly we threw up our hands and said that an award for $15,000 on that element is just and fair and I really cannot support it any more than that.

Finally we turn to the main issue on damages for the Lavender family and that is the lost earnings. We have two experts in this case, both of whom were quite capable and as we indicated in our memorandum of law, helpful in defining the issues to the Court.

But as we point out, we believe that in approaching their testimony, and we mean both experts' testimony, our own as well as the other, we must view that testimony with a degree of common sense and fairness, recognizing that even on this most precise of all the issues, we cannot reach a resolution with anything approaching scientific accuracy. We must be guided to a certain degree by common sense.

There is a very large difference between the two experts. Dr. Berenson's testimony on the lost earnings, not counting household services, was in the neighborhood of $867,000, I believe, and Dr. Fitzgerald's was in the neighborhood of $287,000, although Dr. Fitzgerald recognized that he omitted fringe benefits.

We have submitted in our post-trial memorandum of law the figure of $350,000 as appropriate; the difference between that figure of $350,000 and Dr. Fitzgerald's testimony is largely the fringe benefits which he did not take into account. There are two or three major reasons for the difference, and I will try to be brief, your Honor.

By far, the biggest difference between the two experts concerned the deduction for taxes that

Dr. Fitzgerald made. We believe that case law is now increasingly clear that in suits under the Federal Tort Claims Act, deductions for taxes are proper and indeed required.

We have cited the case of Felder to the Court and we wish to point out,of course, that that Ninth Circuit decision was written by Judge Palmieri of this court sitting designation. There is at least undoubtedly one judge in the Southern District of New York who agrees with that decision.

We also have cited in our post-trial memorandum a case that we had previously overlooked, which is the only Second Circuit case to discuss the issue of taxes in the context of the Federal Tort Claims Act, and we stress that point because all the cases cited by the plaintiff are cases,either diversity cases where the law was New York law, which is completely unclear on this point, or they were cases under FELA or under foreign law.

But the O'Connor case which we cite was the only case in the Second Circuit under the Tort Claims Act, and they allow for deduction for taxes in that case. The decision is based on two analyses, one an application of I believe New Jersey law, which of course would not apply to this case.

But the Second Circuit makes quite clear that the decision is based at least in part on considerations that the Federal Tort Claims Act is intended only to compensate and as the Ninth Circuit has made even clearer in the recent Felder decision, the decedent had he lived would not have had the benefit nor his family, of that portion of his earnings which he would have paid in taxes.

The only other point on the tax issue is that it has been stated on occasion by the courts, including the Second Circuit, that their reluctance to deduct for taxes is because of the speculative nature of that deduction. We believe in this case in view of the expert testimony, there is nothing that is more speculative about that estimate than almost everything else in this type of case.

Dr. Fitzgerald engaged in a rather sophisticated and interesting analysis in order to determine what the probable deductions would be for a family in the position of the Lavenders and we believe that the figures which he came out with, which he testified was somewhere in the range of thirty-five to forty per cent is not at all an unreasonable figure, as the plaintiffs have suggested in their post-trial memorandum.

We point out in the first place that this counts both state and federal and city tax.

We point out that based on the estimates of both experts, with an earning stream that would grow at seven per cent a year and, therefore, at the end of his life Mr. Lavender would have been earning $162,000 a year, obviously he would have been going into a higher tax bracket as he went along. Over an overall average throughout the life, expenses of somewhere between 35 and forty per cent is not at all surprising. That's the number one difference between the two experts, the taxes.

The other differences -- well, in order not to take up too much of the Court's time, I submit there are two differences. One is that Dr. Berenson used the average work-life expectancy and life expectancy, whereas Dr. Fitzgerald, as he testified, felt that the use of those averages tended to overestimate earning income and underestimate the years after retirement, because it assumes with one hundred per cent certainty that the individual would survive through his work-life expectancy, since in general obviously the work-life expectancy is lower than the life expectancy.

We have argued and I won't go through it in detail now that that is a perfectly appropriate type of analysis. There is nothing in the law to forbid it, although as your Honor pointed out, it's the usual practice to charge juries in jury cases that they may use life expectancy tables, the average life expectancy. Nevertheless, the law is also clear that they make take into account the other evidence in the case, and in this case, where we have a very sophisticated and helpful analysis, we see no reason why the Court shouldn't avail itself of it, particularly in view of the fact that we have the testimony of Mrs. Lavender that she and her husband were rather heavy smokers, and their life expectancy might have been lower than the average, which includes both smokers and nonsmokers.

Finally, there is the difference between the two experts which is attributable to the increases or probable increases in earnings over the years. Plaintiff's counsel brought out on cross-examination that Dr. Fitzgerald had omitted in computing the increases certain of those progressive increases that Mr. Lavender would have been entitled to during the period from his death until the expiration of the current contract. Counsel for plaintiff has argued in his post-trial memorandum that that $48 a week difference spread over 35 years means that the defendant's expert's estimate was over by at least $70,000. We submit that that is erroneous, and as we have argued in our post-trial memorandum of law,there are a number of other factors suggesting an overestimate in the earning increases, that the failure to include that particular item by no means renders Dr. Fitzgerald's estimate an underestimate.

Finally, there is one other element of great importance between the two experts, and that includes fringe benefits. Dr. Berenson took at face value Con Ed's estimate that the fringe benefits were worth roughly 26 percent of gross wages, and therefore came out with a fringe benefit, after reducing to present value, of approximately $177,000. Well, I think on its face it's simply excessive and absurd. We are talking about two elements here, medical benefits and retirement benefits.

With respect to the medical benefits, we submit that an award of twenty to twenty-five thousand dollars is more than adequate to remedy the loss of medical benefits that Mrs. Lavender would have received. We note that the medical benefits are contingent upon the continued life of her husband, so they must be discounted for survival probability; they must be reduced to present value, and there is no evidence to suggest, and indeed common sense suggests the opposite, that the cost of getting medical insurance for a family of two would be less than a a family of three, and in addition, of course, at a certain point the daughter will grow up, will leave the houshold, and Mrs. Lavender will just have to get medical insurance for herself. As to today's dollars, one can get rather expensive coverage for medical and hospital and even dental insurance for a figure of $1,000 a year, and keeping in mind that the rate of inflation is somewhat lower than the discount rate, as testified to by both experts, we believe that an award of $20,000 to $25,000 in medical benefits is quite adequate.

With respect to retirement benefits, the area is quite speculative, because we dispute that the cost to Con Ed company-wide of these medical benefits would naturally show the benefit that would have accrued to the Lavender family. A better analysis owuld have been based on what they probably would have received, but neither expert went into that type of analysis in their testimony, and it is an exceedingly complex analysis, and one which a layman should refrain from undertaking. It involves all the contingencies, and then some,involved in the basic analysis. We have to allow a discount for the probability that he would have lived **a normal length of time;** we have to reduce to present value; we have to apply an exceedingly complex formula which determines what the amount of the retirement benefits would have been. Based upon those complexities, we refrained from trying to undertake a layman's analysis. We rather submit that a recovery in the neighborhood of $40,000, keeping in mind that we are talking about benefits perhaps 30 or 40 hears hence which are going to be discounted to present value, that an award to that extent is appropriate.

And therefore, on fringe benefits, we came out with a figure in the neighborhood of $60,000 to $65,000. It was for that reason that we increased Dr. Fitzgerald's estimate of $287,000 up to the $350,000 figure we submitted to the Court. Those deal in the specifics, your Honor.

In closing, I just wish to reiterate that it has been the government's approach in this case, and I hope it always is, to try to be as helpful to the Court and as sincere in our estimates as we can be. We are not, in giving these figures, hopefully, engaged in a process of compromise and settlement. Rather, we have given to the Court what we believe an award should be and what would be justified by the evidence in this case, and we respectfully submit that these are the awards that should be awarded in this case.

Thank you very much.

THE COURT: Thank you. Mr. Ginsberg?

MR. GINSBERG: Yes, your Honor. At the outset, I should thank the Court for allowing me to speak last, since I carry the laboring oar, except to note that the oarsman is fairly tired by 5:25 in the afternoon. I also hope, your Honor, that the fact of the association with my learned opponent with the U. S. Attorney's office and his references to the integrity of the Government'sputting figures on the case not to negotiate, doesn't mean that I have to put my integrity on the line as opposed to the entire government, and that the case can be discussed on the figures.

We have submitted very extensive, both of us, post-trial memoranda which in a large extent, I think for both of us, are almost recorded summations as to a discussion of the evidence that went before, with just a couple of cases thrown in.

I would start by saying I am going to be fairly brief because of that, and also to request, your Honor, if I might have an opportunity on two points raised by my opponent's memorandum, namely, the question of taxes, and whether the discounting is done to the time of trial or to the time of accident, if I could submit about three or four pages in the next day or two just on those two points to discuss a couple of cases they rase. If not, I will discuss them now, but I think it would be more beneficial if I could do that.

THE COURT: What do you say to that?

MR. SCHAFFER: No objection.

THE COURT: All right.

MR. GINSBERG: I should have them in by 5 o'clock tomorrow, your Honor.

To turn to the Luger matter first, your Honor, the question of pain and suffering, I think, is debated adequately in the memos. We claim, of course, that there is sufficient evidence of pain and suffering; my friend claims there isn't. Your Honor will have to evaluate that.

I'd like to turn to the other part of the case. That is really something that bothers me, and which I frankly had not thought of how I could approach it with your Honor. We have cited a number of cases to your Honor where jury verdicts in excess of $100,000, in a couple of cases in excess of $200,000, have been given by a jury to the parents of somebody who was killed; and those verdicts were upheld in two cases by the Second Circuit and in one case by the First Department Court of Appeals on 25th Street. Obviously, your Honor is not a jury, and it's difficult in a sense for me to decide what more

I can do really than we have done. We brought an expert into court. Your Honor has my memorandum. I don't recall whether it was $112,000 or $122,000, it's one of those figures, that the expert projected as the lost contributions to the family if -- if -- and of course that is the big if -- the assumption was made that the present would continue into the future. Mr. Schaffer seemed to indicate that he thought we had abandoned the household help part of our claim; that is not true. I simply added that in passing to the other amount along with promotional questions to raise the amount to the $150,000 that we suggested. I didn't discuss it under a separate heading.

How do we take a 20-year-old boy who is killed through, everybody concedes, no fault of anyone but the Post Office truck, and say to his parents, "We are going to make all the assumptions that will prevent you from getting compensation. We are going to assume that this boy is going to get married in five years. We are going to assume," I gather, "that he is not going to get divorced," even though the divorce rate is now a quarter to a third; I think in Manhattan it's up to about fifty percent of the marriage rate. "We are going to assume he is going to move out of the house. We are going to assume that he is not going to take care of you in old age. So based on all these assumptions, for which there is absolutely no evidence, we are going to give you a pittance of $15,000 for the loss of your son's life and say this is the pecuniary loss."

It's really difficult to argue against that, your Honor, except really to suggest that we have, in trying to project into the future, and when I say "we" I really should say you, the Court, has to, it seems to me, in trying to project into the future, do as little speculation as possible. I have not in my memorandum said let's assume that Mr. Luger is going to die, be hit by a car tomorrow, and John Young would have had to support his five brothers and sisters and mother for the next ten years, so give them a half a million dollars because he probably would have done that.

What I am simply saying is that the evidence we have is that the boy was not seriously involved with a woman, apparently wasn't even going out on dates; he went fishing with his friends. They have produced no evidence to the contrary.

He was obviously a devoted son. He contributed a certain amount. Their economist never refuted any figures presented by Dr. Berenson in the Luger case, and if we assume, and there are many, many, many bachelors, as your Honor I'm sure is aware, there was just a section in the New York Times in the last couple of days about how bachelors cook food these days in New York. There are a lot of people who remain bachelors. There is an awful lot of people who get divorced and who are good and kind to their parents and take care of them. And why are not the Luger parents entitled not to any wild speculation, because we are not asking for that, but why are they not entitled to say, "Your son is giving you 14 percent of his income now, he mows the lawn, he does whatever else he does around the house, and we are not going to give you any more than to say he would continue to do in the future and we are going to base an award on that."

That award will not be nearly as large as a couple of these other cases I pointed out to your Honor, but it would, it seems to me, make some allowance for the kind of very tragic loss, and I am talking about a pecuniary allowance which is permissible under the law, for this very tragic loss that has occurred to the Luger family. That is the approach we suggested. The economist's testimony is unrefuted, and we simply suggest to your Honor that the most accurate projection of the future which benefit and harm nobody would be simply to continue the present, and to take the evidence that has been presented to your Honor of future contributions and use that as the bedrock for making an award to Mr. Luger's parents for something which obviously they had nothing to do with.

To turn to the next case, your Honor, the Lavender case, in the area of pain and suffering, my friend suggests an award of $15,000. We have suggested an award of $25,000. I am not suggesting your Honor split it in the middle at all, because I certainly don't consider my figure is a bargaining figure either. I think perhaps the difference in that award or the amount of that award is based on Mr. Schaffer's position that the pain and suffering was only for five and a half hours because that was when he went into the anasthesia for the operation.

I would submit to the Court that in a death case under the Noseworthy vs. New York doctrine, in the New York law where the plaintiff does not have the same burden of proof as if he is alive, and apparently nobody at least who testified saw Mr. Lavender after the anasthesia, there is no reason to assume that he remained unconscious; and I would suggest that the difference between Mr. Schaffer's and my amount is that I would ask the Court not to assume that he remained unconscious after that five and a half hour period, but to award him a monetary sum until he died, which was -- I don't have the file in front of me, but I think it was some 12 hours after the accident.

Insofar as the loss of consortium, we both agree there is only one case. Your Honor can read it as well as we. If your Honor feels that it has changed the law of New York, then obviously we are entitled to an award. If your Honor does not think it has changed the law of New York, then we are not entitled to an award. I don't think I need comment on it any further except that we both agree that that is the case to consider.

Let me move to what is obviously the single major area that we will be talking about and I am sure your Honor will be considering, and that is the financial remuneration to his wife and child for the economic loss of the breadwinner, Mr. Lavender. We start out, and I am repeating something here that I did say in my memo, since I know your Honor hasn't read it, we start out with, it seems to me, a single fundamental fact that should shed light upon all of the other testimony in the case, and that is that the defendant's expert concededly,without even considering fringe benefits or help around the house, projected a lost earnings of over $2 million for the lifetime of Mr. Lavender. I accept this figure. Dr. Berenson reduced that figure, and my friend is correct, and

I don't remember the exact figure, but I can talk of hundreds of thousands, somewhere in the $850,000 range, to which he added the household expense. When I say he reduced it to that, that was after deducting for personal expenses, discounting to present value, and considering fringe and overtime benefits.

I say, and I use the $2 million figure, your Honor, and it was $2,200,000, I think, I use that to show that we are starting not at a huge monumental beginning, but that Dr. Berenson is starting at a conservative base, less than half we are asking of what their expert said this man would have earned in a lifetime. I think we must start with that. I also agree to a large extent with what my friend said, that of the reasons that their expert was down at the $287,000 range, and incidentally, he I don't think really went through each calculation the way that Dr. Berenson did, so I am not sure how he got there. But I know some of the things I did ask him about, there was discounting, and both experts used a 7 percent approximate inflation; there was a slight difference in the discount only because Dr. Fitzgerald had taken taxes off. But the differences were caused by a number of things. Number one, Dr. Fitzgerald did not include that last $48 raise that Mr. Lavender would have had, and your Honor might remember that that was based on the books that were in evidence which would indicate that Mr. Lavender would slowly be approaching the maximum for mechanic A's, whereas Dr. Fitzgerald froze him at the mechanic A rate that he was receiving at the time of his death.

It was also caused by the fact that Dr. Fitzgerald reduced his amount not to date of trial but to the date of the accident. When I say reduced, I mean discounted to present value, and this would have brought his amount to 300 something. I have the exact number in the papers.

The other reason, of course, is that he did not consider fringe benefits. The other reason was this whole question which I will just take thirty seconds on, and I don't think there is a disagreement whether if somebody performs househol services is a net consumer or a net provider. I think Dr. Fitzgerald stated the principle that we agree with, and that is the principle that there are certain services provided by the male member of a household which are irreplaceable. His wife just can't do the heavy lifting that he can do. These are the only services that we are asking for in Mr. Lavender's case. He may have helped his wife do the dishes; we aren't asking that. He may have done some dusting; we aren't asking for that either. We are asking for the kind of heavy work that only a husband can do around the house.

There was evidence produced from Dr. Berenson from certain economic journals, and as your Honor may recall, I asked Dr. Fitzgerald whether that was a proper basis, and he said he recognized these books as authorities in this area of family contribution.

On the area of taxes, there are a number of things I want to say about taxes, your Honor. The first thing is that the figures used by Dr. Fitzgerald are absurd, and that is the only way I can characterize them. To say that a man in this income bracket would be paying 35 to 40 percent of his earnings in taxes is ludicrous. I annexed a tax table to show how ludicrous they were, to show that even if he didn't have an accountant, and didn't itemize deductions, in fact he'd only be paying 15 percent of his income, even if the Court were to consider taxes.

The Felder case which is cited by my friend, Mr. Felder was making somewhere between 60 and $115,000 a year. In that case the Court used, I think, a 20 percent figure for taxes. And to claim that a Con Ed manual employee is up in the 35 to 40 percent tax bracket is, as I indicate, somewhat ludicrous.

That was how he reduced this amount by 35 to 40 percent. That explains how you get a substantial part of the reduction from 850 down to what would be about 350 projected to the present time.

THE COURT: Mr. Ginsberg, do you remember, I asked somewhere along the line, I asked some expert, I guess it was your expert, if you took your million-dollar figure, that that would earn the wife in the first year, put at 6 percent interest, they would get $60,000.

MR. GINSBERG: I am coming to that last, but I will do it now.

THE COURT: I am troubled with that concept here, because I am not expecting naturally that she is going to put this kind of money out at interest. She may put it out at good stocks which may go up with the country. If she ends up with a million dollars, or if she ends up at $350,000, which is the government's figure, she may be well advised to go to Scudder, Stevens & Clark or Merrill Lynch and say, "Put this into good stuff," so her holdings increase with the country. I remember coming to the realization that if they took $20,000 a year, she'd wind up with $3,350,000 and still wind up living on $20,000 a year for life. If she took her million and invested the $40,000 or the $20,000 every year that she received from it, I suppose I am leaving a tax figure out of this, but if she invested $40,000 each year cumulatively, she would end up, in addition to her original million, she would endup with $1,250,000 more. If you get to that, and keep in mind I have to leave here in about eight or nine minutes.

MR. GINSBERG: I only had one other item on the taxes, your Honor. I am going to brief this, and it will be here tomorrow, and I will hit your Honor's point, which I was saving for the last because I think it's the single most important point that I wanted to discuss in the case.

On the taxes, I don't think there is any difference in the decisions between the Federal Tort Claims Act and other cases. The **McWeeny** case in this department and the very case my friend cites, the Felder case, which adopts **McWeeny** both stand for the proposition that upper income people's income taxes are to be considered and lower and middle income people's income taxes are not to be considered. That is the holding in **McWeeny**. The Felder case follows **McWeeny.**

THE COURT: That is unconstitutional discrimination, if you ask me.

MR. GINSBERG: No more, your Honor, than the tax law which says that if you make a certain amount you have a 50 percent tax, and if you make a lesser amount, you have a 15 percent tax. That is the reason, and I think your Honor will find that is the holding in both cases. Again, that will be in the brief.

Now I will move to your Honor's last point, because obviously it's the single most troubling point. On the assumption that the evidence substantiates the figure for the reasons I indicated, advanced by Prof. Berenson, because of what I indicate are erroneous assumptions in the figure of Dr. Fitzgerald, and as your Honor has indicated, we are asking for $1 million for the economic loss part of the award, although that does include parental care and guidance, and items other than loss of consortium and conscious pain and suffering.

What would then happen? Number one, your Honor, I have -- well, maybe I should just take your Honor's example and see what really happens, because I think that is important. I think that if your Honor reads or has the testimony read back,you will find that Dr. Fitzberald in a sense answered your Honor by saying that these things, the very question your Honor asked, is handled by the discounting, and by that, what I suggest he means, your Honor -- he didn't say this, this is now my interpretation -- what he means is that when you get the $2,200,000, which would have been the actual amount of earnings, and discount it to

$800,000 or so, and it wouldn't be $800,000 because there is a personal consumption factor taken out, so it might be a million, but when you reduce it to about half of what it was, you have taken into account this factor that your Honor worries about.

How does that happen? It happens as follows: This year -- and I raise other question in the brief and maybe I will take them first. I indicate, first of all, to your Honor, if you are looking at equities, you must consider that the lawyer's fee will come out, and if it's 25 percent, which under the Tort Claims Act is, she will only get $45,000 rather than $60,000 --

MR. SCHAFFER: Your Honor, I don't want to interrupt, but I really object to that particular consideration. I also may add that the Federal Tort Claim Act does not require a fee of 25 percent. It only sets that as a limit.

MR. GINSBERG: I don't mean to discuss my fee but --

THE COURT: I don't think that is a valid consideration here either. I am making an award to her, and whatever arrangement she makes or I approve is another matter, it seems to me.

MR. GINSBERG: Again, this is covered, but I would at the risk of repetition, because it is important, just breifly indicate why I think you should consider it. There is a legal concept as set forth in the Decedents Estate Law of the State of New York, repeated in the Pattern Jury Instructions, which says to a jury, give a widow the pecuniary loss to her husband.It doesn't say invest the money. It doesn't say what is considered or not. It says pecuniary loss. The only discussion of investment that I know of is in the Nanovich case where Judge Bartels is not suggesting that the fact-finder use that as a criteria in explaining why he was reducing or the court was reducing a verdict.He mentioned this. But nobody has suggested, or to my knowledge charged a jury that investment should be considered.

There are a lot of reasons for that, your Honor. My friend used the personal example that he's just become a father. I just checked one of my mutual funds with a very fine investment house that I put $1,000 in some years ago. I found out that it's now worth $250. And I am not stupid. Or maybe I am in that regard.

But I think, your Honor, if one looks at the suicides in 1929, or if one looks at the brokers who were wiped out in 1969, much more recently, your Honor must be aware of the fact that safe investments, brilliant financial consultants are not always right, and that people get wiped out. So the only fair thing -- and I am assuming the banks won't fold -- if your Honor wishes to consider 6 percent, that is fine. Dr. Fitzgerald said, and I think he is right,that if there were no inflation, the interest rate, and he is their expert, would be 2 percent.

So if your Honor doesn't consider inflation, then it should only be 2 percent, and then she would only be making the same $20,000 a year, which is another problem but -- which would pay her exactly what she should be getting.

If you are going to consider 6 percent, which is an inflationary rate of interest, then it seems to me you have to consider the inflation which is going to wipe her out.What do I mean by that? This year, sure, she spends $20,000, she gets 60, spends 20, saves 40. But next year she spends 22, only saving 38. According to Prof. Berenson's figures, I think somewhere around 11 or 12 years from now she will reach the break-even point where she will hit -- I might have been wrong on that, that might have been on my $45,000 figure; it may be 17 years. But the experts agree that by the end of his work expectancy, Mr. Lavender would be bringing home $160,000 to $180,000 a year in income.

At that point, again using your Honor's figures and for the years before that, Mrs.Lavender would be receiving 60 and having to spend to keep the same standard ofliving 180. So she would be dipping in her principal at 120. What I am suggesting to your Honor, that your Honor's analysis, and I don't care if an actuary or tables or anything are consulted, if that is the basis, if your Honor is going to use a 6 percent interest, which is inflationary, your Honor mustconsider it to be equitable that inflation is going to wipe this out.

If you have Dr. Fitzgerald's testimony read back, you will see that he said the discount rate which takes these into account does not assume that the principal will be left at the end of the period, but that the principal will be wiped out. I think, your Honor, as I interpret his testimony, this is what he is saying. What he is saying is that if you take the kind of interest rate that your Honor is talking about as an economist, and I am not talking about as a judge now, if you take it as an economist, you must take the inflation as an economist, and if you take both of these, they will all cancel each other out because of the discounting; and at the end of the 45 or 34 or whatever number of years, there will be nothing left.

So I would suggest, your Honor, that the approach which really is only your Honor's approach, it's interesting to note that the defendant's expert did not come in and say, "Let's put this money in a bank and get $60,000." He did exactly the same thing Dr. Berenson did. He came out with different figures because, one, he considered a 35 to 40 percent tax, which immediately reduces Dr. Berenson's figure by 35 to 40 percent. He did not give Mr. Lavender the credit for the $48 a week we found out he'd be making. He never considered fringe benefits which, according to Dr. Berenson, would add $170,000. And I think those are the discrepancies.

But they didn't disagree in principle, and it's only your Honor -- don't misunderstand, I am not angry or quarreling with your Honor, but I think if you do consider that, the fact that both sides in an adversary proceeding basically used the same approach, and it was only because of certain differences that they came up with different numbers, that that is the approach that should be used, and I would therefore suggest to your Honor that you take each of these areas, you decide, "Should I add the $48 or shouldn't I? Are the fringe benefits only worth $65,000 or are they worth $170,000? Is the personal consumption to be 25 percent or 40 percent?"

In that area, of course, I would suggest that some areas of personal consumption are not reduced, such as rent and electricity because a person dies. The rent is still the same for two people.That your Honor take each of these areas and that would be fair to both of us, and come up with the figure that would be, from the approach used by both experts, the answer to the question.

Thank you.

MR. SCHAFFER: Two words, your Honor. Since Mr. Ginsberg has purported to speak for the defendant, we are not in agreement. Your Honor can establish just by playing the numbers, very small variations in assumptions will produce enormous differences. The defendant's contention is that after all the parts of the sum have been adjusted and your Honor has made his rulings of law, the Court still has an obligation to view the whole and to decide whether, as a matter of common sense it's a fair judgment. We contend that a judgment in the neghborhood of $800,000, $1 million, is simply unfair and inappropriate.

Thank you.

THE COURT: Thank you very much.

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OPINION.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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CAROL LAVENDER, as Administratrix of
the Goods, Chattels and Credits of
RONALD LAVENDER, deceased, and JOHN
M. LUGER, as Administrator of the
Goods, Chattels and Credits of
JOHN W. LUGER, deceased,

Plaintiffs,

-against-

UNITED STATES OF AMERICA,

Defendant.

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#45844

75 Civ. 3520

OPINION

FILED
U.S. DISTRICT COURT
APR 28 2 24 PM '77
S.D. of N.Y.

OWEN, District Judge

On October 31, 1974, at 3:00 o'clock in the morning, on Ninth Avenue near 36th Street, a Consolidated Edison emergency crew was working in and around a manhole in the street. A United States Post Office truck, concededly negligently operated, ran into those assembled, tragically killing two, John W. Luger and Ronald Lavender. Liability being conceded, the Court has the sole and sad duty to fix damages.

John W. Luger was a 20 year old unmarried man, who had graduated from high school and had gone to work for Consolidated Edison the year before. He lived at home with his parents and several brothers and sisters and contributed approximately $30 per week (something over $1500 a year) to the household. The "household" on the other hand, fed him and contributed in turn to his clothing. He apparently contributed a modest amount of services. His parents are in their mid-to-late 40's and in good health. John M. Luger, the young man's father, sues as administrator. While the record is silent on this subject, it is urged upon me that John Luger would have lived at home for the rest of his parents' lives and would have continued to contribute to their support. Therefore, plaintiff argues, I should make an award based upon this assumption. I am unable to reach such a conclusion, finding rather, that it is the greater possibility that a healthy young man of 20 would marry within the next several years, and thereafter need all of his income for his own growing family. In addition, the parents are in good health and the father has a good job. Thus, I do not see with sufficient clarity the parents' need for such support money in the future or, if need there be, why it could not be furnished by other unmarried children coming along. While my view of the evidence would lead me to award a somewhat lesser amount, including a discount for that part which is prospective, the Government urges an award of $15,000 for loss of economic support. This figure, which shall include recompense for any loss of services as well, is not out of line and is awarded.

I do not find sufficient evidence of conscious pain and suffering to justify any award under that rubric. Funeral expenses were $2,063.34 and are awarded.

Carol Lavender, 29 years old, sues as administratrix of the estate of her deceased husband, Ronald Lavender, who was 27 at the time of his death. They married in 1970 and a daughter, Deborah, was born in 1972. Mr. Lavender, at the time of his death, on an annualized basis, had, with overtime, gross earnings of over $16,000 before taxes. While additional modest in-grade increases were clearly expected, it was not urged upon the Court that Mr. Lavender, with a tenth grade education, would have become a foreman in later years with the increases attributable to such a grade. His life expectancy at the time of his death was 43.5 years and his work expectancy was 34.3 years. Certain fringe benefits were available to the family during his lifetime, the major ones being pension rights and medical insurance, which must be replaced. I do not find, however, that their loss was nearly the same gross percentage of base pay that plaintiff's counsel urges upon me. I also, in computing the future loss of support, make deductions for taxes that would necessarily have been paid, and that share of the net income attributable to the decedent's expenditures. I assume, as I am required to do, that Mrs. Lavender will not remarry.

I find the loss of support for the decedent's wife and child from the date of decedent's death until the present(1) to be $24,225(2) and their loss of future support, discounted to present value, to be $258,673(3) for a total award for loss of support of $282,898. Of this amount, $15,000 is to be segregated and specifically awarded to daughter Deborah for the expenses of higher education in the belief that this would have been the father's wish and funds saved to that end. I further award Deborah $15,077 for loss of parental care and guidance.(4) For the conscious pain and suffering of Mr. Lavender over 5 1/2 hours before his death, I award the additional sum of $15,000(5) and, finally, I award the sum of $6,150.92 for funeral and medical expenses.

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(1) Contrary to the government's position, awarding actual loss of support to date and loss of future support discounted to present value from this date does not amount to awarding prejudgment interest in contravention of 28 U.S.C. § 2674. See Moore-McCormack Lines, Inc. v. Richardson, 295 F.2d 583 (2d Cir. 1961), cert. denied, 368 U.S. 989, 370 U.S. 937 (1962), in part affirming, in part affirming as modified, and in part remanding as modified, 184 F. Supp 585 (S.D.N.Y. 1960).

(2) I award $1,400 for the remainder of 1974, $9,200 for 1975, $10,200 for 1976 and $3,425 for 1977 to date. These amounts reflect the projected increases that I find Lavender would have received under the collective bargaining agreements.

(3) I find that their loss of future support for the remaining 31.8 years of decedent's work expectancy of 34.3 years at the time of his death, to be $349,800, based on a loss of $11,000 per year. Assuming payment on a monthly basis with payments accruing at the end of each month and discounting this amount to present value using a discount rate of 2% per annum, which plaintiffs, in their post-trial memorandum, in accord with defendant's expert agree would be the rate of return of money in an inflation free economy, I award $258,673 as damages for loss of future support. By using such a discount rate one comes as close to dealing with future vagaries of inflation as possible, since higher discount rates generally reflect and are correlated with the rate of inflation and therefore with the rate of return that a prudent investor may expect to realize on the investment of funds. Furthermore, I conclude that there would be no substantial diminution in loss of support to the wife due to the ultimate emancipation of his infant daughter Deborah and therefore make no reduction in support after Deborah's emancipation.

While the record is sketchy on the survivors' interest in "fringe benefits" at Con Ed, some award for the loss of far-distant pension rights is appropriate. There is evidence from which to conclude that Mrs. Lavender's share of pension rights, based on 80% of the maximum straight-time compensation of a Grade A mechanic, would amount to $600 per month. Thus, I award

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(4) The award is made on the basis of $1,100 per year. $2,750 represents loss to date and the remaining $12,327 represents the present discounted value of the loss of future parental care and guidance over the remaining 12.7 years of Deborah's minority on the basis of monthly payments accruing at the end of each month.

(5) See Cook v. Erwin, 289 N.Y.S.2d 730 (App. Div. 3d Dep't 1968).

Mrs. Lavender/the present value today of $600 per month, discounted at the rate of 2% per annum, payable at the end of each month starting with the end of decedent's work expectancy some 31.8 years from now and ending 48 years from now, which I find is the remainder of Mrs. Lavender's life expectancy at the time of her husband's death. This amounts to $52,056. Similarly, an award for loss of medical insurance is indicated. I award $13,165 for loss of past and future medical and hospitalization insurance, based on a yearly cost of $500.(6)

Finally, since I conclude that on this record Mr. Lavender was a net consumer of household services, and there being no overall increase in the cost of such services proven, I make no award under this rubric.

I am urged to award a sum for loss of consortium. While sympathetic, I feel constrained to deny an award under this rubric. A wrongful death action in New York is a creature of statute, being unknown at common law. Damages thereunder are thus governed and limited by Estates, Powers and Trusts Law § 5-4.3 to ". . . compensation for the pecuniary injuries . . . ." (underscoring supplied). The Court of Appeals of New York has not spoken to the contrary on this subject, and I regard the dissent in Martins v. Ford, 385 N.Y.S.2d 620 (App.Div. 2d Dep't 1976) as properly construing the statute.

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(6) $1,250 is for the loss of such benefits to date and the remaining $11,915 represents the present value of $500 per annum over the remaining 31.8 years of Mr. Lavender's work expectancy, discounted at a rate of 2% per annum, payments accruing on a yearly basis at the beginning of each year.

To sum up, I award the total sum to John M. Luger, as administrator for his son, John W. Luger, of $17,063.34, and I award to Carol Lavender, as administratrix for her deceased husband, Ronald Lavender, the total sum of $384,346.92. I further direct that the awards included therein to Deborah of $15,077 for loss of parental care and guidance and $15,000 for higher education be placed in an appropriate account to be paid over to daughter Deborah in four yearly installments(7) commencing with her 18th birthday and to be invaded in the interim solely upon application to this

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(7) The first installment shall be one-quarter of the balance on account on date of payment, the second installment shall be one-third of the balance remaining on account on date of payment, the third installment shall be one-half the balance remaining on account on date of payment, and the fourth installment shall be the remaining balance of the account.

Court on a showing of necessity.

Finally, plaintiff Carol Lavender, as administratrix of the estate of her late husband Ronald Lavender, is directed to apply to the Surrogate's Court of Queens County, State of New York, to obtain a proper apportionment of the award for support herein, pursuant to E.P.T.L. § 5-4.4 and in accordance with this opinion.

The foregoing constitute my findings of fact and conclusions of law.

Submit judgment accordingly.

April 27, 1977.

United States District Judge

U.S. DISTRICT COURT
FILED
JUN 14 1977
S.D. OF N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CAROL LAVENDER, as Administratrix of the Goods, Chattels and Credits of RONALD LAVENDER, deceased, and JOHN M. LUGER, as Administrator of the Goods, Chattels and Credits of JOHN W. LUGER, deceased,

Plaintiffs,

-against-

UNITED STATES OF AMERICA,

Defendant.

75 Civ. 3520
(R.O.)

JUDGMENT

#77,779

The within action, having come on for trial before HON. RICHARD OWEN on January 18, 19 and 20, 1977, and the plaintiffs being represented by FUCHSBERG & FUCHSBERG, (Robert M. Ginsberg, of counsel), and defendant being represented by ROBERT B. FISKE, JR., (Frederick P. Schaffer, of counsel, and the parties having submitted memorandums and suggested findings, and due deliberation being had thereon, and an opinion having been filed on the 27th day of April, 1977,

NOW, upon the motion of FUCHSBERG & FUCHSBERG, it is ORDERED AND ADJUDGED, that plaintiffs have judgment against the defendant on the issue of liability, and it is further ORDERED AND ADJUDGED, that the plaintiff JOHN M. LUGER, as Administrator for JOHN W. LUGER have judgment for and do recover of the defendant the sum of $17,063.34, and it is further ORDERED AND ADJUDGED, that plaintiff CAROL LAVENDER have judgment and do recover of the defendant in the cause of action for conscious pain and suffering the sum of $15,000.00, and it is

JUDGMENT

further

ORDERED AND ADJUDGED, that plaintiff CAROL LAVENDER have judgment for and do recover of the defendant the sum of $369,346.92 in the cause of action for wrongful death, and it is further

ORDERED AND ADJUDGED, that of the aforesaid sum the amount of $30,077.00, less appropriate attorneys' fees, be placed in special fund for the benefit of the infant daughter, to be paid together with the interest thereon in four ~~(4) equal~~ annual installments commencing with her 18th birthday as defined (see to be used for the higher education of the infant daughter DEBORAH, and it is further

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ORDERED AND ADJUDGED, that plaintiffs have execution therefor.

Dated: New York, N.Y.
June 10TH, 1977.

U.S.D. Judge.

EW

Plaintiffs' Addresses:

CAROL LAVENDER
66-10 Grand Avenue
Maspeth, New York 11378

JOHN M. LUGER
48 Adams Street
Floral Park, New York

JUDGMENT ENTERED 6/15/77

Raymond F. Burghardt
CLERK

RO

The first installment shall be one-quarter of the balance on account on date of payment, the second installment shall be one-third of the balance remaining on account on date of payment, the third installment shall be one-half the balance remaining on account on date of payment, and the fourth installment shall be the remaining balance of the account.

service of three (3) copies of

the within is .

hereby admitted this 24th day

of Sept , 1977

E. Swanston

Attorney for